

9-27-2016

Krinit v. Idaho Dept. of Fish and Game Clerk's Record v. 2 Dckt. 44326

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IN THE Vol.

2

of

3

**SUPREME COURT
OF THE
STATE OF IDAHO**

LAW CLERK

S.C. # NO. 44442-2016

PERRY KRINITT

Plaintiff/Respondent

vs.

**STATE OF IDAHO DEPARTMENT OF
FISH & GAME AND
STATE OF IDAHO**

Defendant/Appellant

LIMITED CLERK'S RECORD ON APPEAL

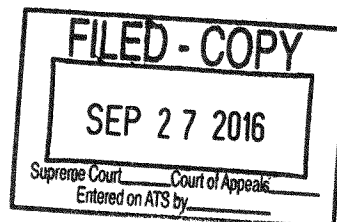
*Appealed from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Lewis.*

Charles H Carpenter

Attorney for Respondent

Peter J Johnson

Attorney for Appellant



IN THE SUPREME COURT OF THE STATE OF IDAHO

Perry Krinitt,
Plaintiff/Respondent

vs.

SUPREME COURT
NO. 44326-2016
NO. 44442-2016

State of Idaho Department of
Fish and Game and
State of Idaho,
Defendants/Appellant.

LIMITED CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Lewis.

HONORABLE GREGORY FITZMAURICE

Charles H Carpenter

Peter J Johnson

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FILED
AT 1:47 O'CLOCK PM

JUN 13 2016

ALESIA WINNER
Clerk of District CourtBy Dawn Rudolph
Deputy

PETER J. JOHNSON, ISB # 4105
 Johnson Law Group
 103 E. Indiana, Suite A
 Spokane, WA 99207-2317
 Phone: (509) 835-5000
 Fax: (509) 326-7503
 Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT,

Plaintiff,

v.

IDAHO DEPARTMENT OF FISH AND
 GAME and STATE OF IDAHO,

Defendants.

NO. CV 12-146

DEFENDANTS' MEMORANDUM OF
 AUTHORITIES IN SUPPORT OF
 MOTION FOR RECONSIDERATION
 OF A PORTION OF THE SUMMARY
 JUDGMENT MEMORANDUM
 ORDER AND JUDGMENT

[Oral Argument Requested]

I. INTRODUCTION

Defendants (hereinafter "IDFG") respectfully disagree with the Court's analysis upon which it based its decision to award attorney fees and costs to Plaintiff from January 31, 2014, to the present. These sanctions were assessed against IDFG because the Court held that IDFG failed to file a particular dispositive motion prior to the cut-off date in the initial scheduling order. IDFG submits that this is not the case. IDFG filed two separate dispositive motions prior to the January 31, 2014,

DEFENDANTS' MEMORANDUM OF AUTHORITIES IN
 SUPPORT OF MOTION FOR RECONSIDERATION - 1

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schedule order deadline – both of which were granted. The granting of these motions was dispositive of the entire case and the complaint was accordingly dismissed by the Court on July 7, 2014.

II. BACKGROUND

This case was originally filed on August 30, 2012. The initial scheduling order provided for the filing of dispositive motions by January 31, 2014. Defendant complied with that scheduling order by filing two summary judgment motions, the first of which addressed the claims of Erynn Peralta, and the second based upon IDFG's position that the remaining Plaintiff could not demonstrate the requisite elements of a negligence claim.

On January 21, 2014, the Court granted IDFG's summary judgment motion dismissing the claims of Erynn Peralta. She did not appeal this order. On January 31, 2014, IDFG filed its second summary judgment motion seeking dismissal of Mr. Krinitt's remaining claims. The Court heard argument on this motion on May 30, 2014, and entered an order granting summary judgment on July 7, 2014. This ruling was dispositive of the remainder of the case. On July 7, 2014, the Court entered a judgment dismissing the complaint with prejudice and vacating the trial date, which had been set for September 22, 2014.

Mr. Krinitt appealed the dismissal. Oral argument took place before the Idaho Supreme Court on August 28, 2015. On October 2, 2015, the Idaho Supreme Court issued an opinion which reversed the dismissal, and on October 26, 2015, remanded the case to the trial court for further proceedings. At the time the case was remanded, there was no longer a scheduling order in place. The trial court conducted a scheduling conference with counsel on November 19, 2015, during which the Court strongly encouraged the parties to consider mediation. After discussion, the Court issued two orders dated November 24, 2015, requiring the parties to mediate the matter and setting

DEFENDANTS' MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION FOR RECONSIDERATION - 2

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a new trial date of October 17, 2016. During this scheduling conference, the parties' counsel advised the Court that some discovery remained which they had agreed to defer pending a ruling by the Court on the second summary judgment motion. *See Affidavit of Peter J. Johnson.* The Court left it to counsel to prepare a new scheduling order. Counsel again agreed to defer this task in order to devote time to scheduling and conducting a mediation. *See Affidavit of Peter J. Johnson.*

As is well known to the Court, mediation scheduling was difficult. The parties could not agree on the selection of a mediator. Mr. Krinitt insisted on one of four California lawyers or a Montana lawyer. Pursuant to the Court's order to mediate, the parties submitted a list of proposed mediators from which the Court intended to select a mediator. On January 13, 2016, the Court conducted a teleconference with counsel to select a mediator from the parties' proposed lists. Shortly prior to that conference, the Court and IDFG were advised that pursuant to a doctor's order, Mr. Krinitt could not travel to the Northwest for the mediation due to health issues. *See Affidavit of Peter J. Johnson.*

The Court struck a compromise by requiring Mr. Krinitt to submit a medical letter confirming his inability to travel to the Northwest, by selecting a retired Idaho judge who was willing to travel to California for the mediation, and permitting IDFG to decide if it would still participate in a mediation in Southern California. *See Affidavit of Peter J. Johnson.* The Court made it clear that it would not compel IDFG to mediate in California and indicated that it would require Mr. Krinitt to pay certain expenses of the mediator to travel to California. *See Affidavit of Peter J. Johnson.* Notwithstanding that a representative of the Idaho Risk Management Department and defense counsel would have to travel to California, IDFG agreed to participate in good faith in mediation in Southern California. *See Affidavit of Peter J. Johnson.* Unfortunately, the mediation was

DEFENDANTS' MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION FOR RECONSIDERATION - 3

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unsuccessful. To date, Mr. Krinitt has never submitted the medical evidence. See Affidavit of Peter J. Johnson.

IDFG then filed a motion seeking dismissal on the basis of statutory employer immunity. As thoroughly discussed and analyzed by the Court, the Idaho Supreme Court permits a statutory employer immunity defense to be raised at any time before trial, provided the adverse party has adequate time to respond, which in this case it did. Although the Court properly granted this motion, it assessed fees and costs from January 31, 2014, based upon its analysis that IDFG had not filed this dispositive motion before January 31, 2014. Under the facts and circumstances of this case, IDFG respectfully submits that the Court's application of I.R.C.P. 16(i) is inappropriate.

II. ARGUMENT

There are no cases that have addressed this particular situation. The awarding of attorney fees in Idaho is dependent upon a statute or rule of the court permitting the awarding of such fees. *Idaho Power Co. v. Idaho Public Utilities Com'n*, 102 Idaho 744, 639 P.2d 442 (1981); *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984). The Court ruled that sanctions were appropriate pursuant to I.R.C.P. 16(i) because there was a failure by IDFG to comply with the initial scheduling order, although the failure was not intentional. However, IDFG in good faith had submitted two motions which it felt were dispositive of the merits of the case—both of which were granted. IDFG acknowledges that it did not consider a dispositive motion based on the statutory employer immunity at that time through an oversight.

The Idaho Supreme Court has not imposed any restrictions on filing a motion asserting the statutory employer immunity defense which could serve as a basis for I.R.C.P. 16(i) sanctions:

[T]his Court has held that an affirmative defense may be raised for the first time on a motion for summary judgment. ... Though we noted an affirmative defense cannot

DEFENDANTS' MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION FOR RECONSIDERATION - 4

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be raised for the first time on appeal, we held "that where the defense was raised before trial and the defendant was given time to present argument in opposition, the defense...can be raised for the first time in the summary judgment motion." *Id.*

...Thus, the *Bluestone* requirement that "the defendant was given time to present argument in opposition" was met. Appellants were alerted to the immunity defense by the Memorandum accompanying the State's Motion for Summary Judgment and had time to respond and present their opposing argument.

Therefore, we hold summary judgment was proper and that the State did not waive its affirmative defense of immunity.

Fuhrman v. State, Dep't of Transp., 143 Idaho 800, 803-04, 153 P.3d 480 (2007).

In addition, the Idaho Rules of Civil Procedure permit any party to move for summary judgment on all or part of a claim:

Idaho Rules of Civil Procedure Rule 56(b). Summary Judgment - For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in that party's favor as to all or any part thereof. Provided, a motion for summary judgment must be filed at least 90 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.

I.R.C.P. 56(b).

After mediation failed, IDFG properly submitted its motion for summary judgment as to the statutory immunity issue approximately seven months before the new trial date.

III. CONCLUSION

As the Court and Plaintiff's counsel recognized, there was no intentional or bad faith intent on the part of IDFG. IDFG does not take issue with the Court's analysis of its discretion with respect to the application of I.R.C.P. 16(i). However, IDFG respectfully submits that its application to this case is inappropriate. IDFG had timely and successfully sought dismissals of the claims which

DEFENDANTS' MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION FOR RECONSIDERATION - 5

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resulted in the vacating of any pretrial scheduling orders. Subsequently, the Supreme Court disagreed with the dismissal of Mr. Krinitt's claims and remanded the case for further proceedings. Even after IDFG recognized that a dismissal might also be obtained under the statutory employer immunity, it voluntarily attempted in good faith to resolve the case through mediation. When this was unsuccessful, it sought the present relief.

IDFG understands the Plaintiff's counsel will be submitting a request for fees and costs, which will likely be filed contemporaneously with IDFG's motion to modify the dismissal order and judgment. IDFG respectfully request the opportunity to address Plaintiff's fees and costs request in a subsequent pleading.

DATED: June 13, 2016.

JOHNSON LAW GROUP

By: 

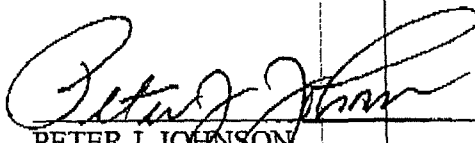
PETER J. JOHNSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 13 day of June, 2016, I caused to be served a copy of the foregoing by the method indicated below and addressed to the following:

Charles H. Carpenter
Carpenter Law Firm, PLC
210 N. Higgins Avenue, Suite 336
Missoula, MT 59802
Phone: (406) 543-0511
Fax: (406) 258-0365

☐ U.S. Mail
☐ Hand Delivery
☒ Facsimile
☐ Federal Express


PETER J. JOHNSON

[X:\1750\Trial Court\Plg\MEM - Recon (2016-06-10).wpd

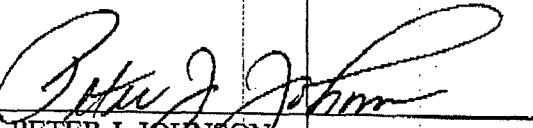
DEFENDANTS' MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION FOR RECONSIDERATION - 6

JOHNSON LAW GROUP
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Spokane, WA 99207-2317
TEL: (509) 835-5000 FAX: (509) 326-7503

DATED: June 13, 2016.

JOHNSON LAW GROUP

By

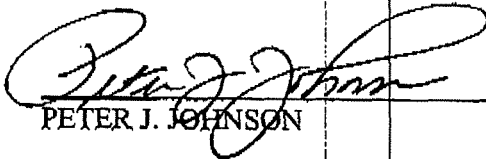

PETER J. JOHNSON
Attorney for Defendants

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PETER J. JOHNSON

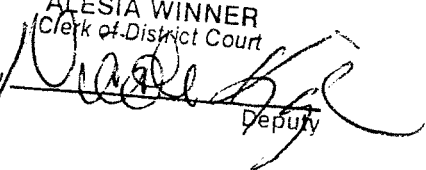
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DEFENDANTS' MOTION FOR RECONSIDERATION - 2

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carpentc@carpenterlawfirmplc.com

Lewis County District Court
FILED
AT 10:50 O'CLOCK AM
JUN 16 2016

ALESIA WINNER
Clerk of District Court
By  Deputy

Attorney for Plaintiff

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT
LEWIS COUNTY

PERRY KRINITT)

No. CV 12-146

Plaintiff,)

v.)

IDAHO DEPARTMENT OF)
FISH AND GAME, and)
STATE OF IDAHO,)

Defendants.)

VERIFIED MEMORANDUM
OF COSTS & ATTORNEYS FEES

State of Montana)
County of Missoula) ss

Charles H. Carpenter, being duly sworn on his oath, deposes and states as follows:

1. I am the attorney for the Plaintiff in this action, and submit this memorandum of costs and attorney's fees pursuant to the Court's order of June 1, 2016.

2. As noted in that Order, Plaintiff incurred considerable expenses and attorney's fees in this action between January 31, 2014 and June 1, 2016. Attached hereto is a summary of time and costs incurred between those dates.
3. Attorney's fees in the summary are calculated at standard hourly rates: \$280.00 for Charles Carpenter, \$400 for John Sullivan. I have been lead counsel throughout the case. Mr. Sullivan assisted the client in preparation for, and during, the recent mediation. I have been practicing law since 1991. Mr. Sullivan practices in Orange County, California, and has been practicing since 1975. He has very extensive experience in mediating personal injury cases.
4. Plaintiff employed three experts during the time period covered by this memorandum. Douglas Stimpson of Accident Investigation & Reconstruction, is Plaintiff's principle expert on liability issues. Larry Grandy, of Air Methods Corporation, serves as Plaintiff's rebuttal expert on liability. Both have extensive experience, and their qualifications are in the record of the case. In addition, throughout the case, Plaintiff has employed a non-testifying expert, Richard McPherson of DownRange Global Solutions, to advise him and counsel on technical issues. His time in this memorandum relates exclusively to his work in connection with the 2014 Motion for Summary Judgment, and the expert depositions taken in March 2014. Fees for all three experts are based on their standard rates.
5. With respect to costs, the State of Idaho has already paid costs as ordered by the Idaho Supreme Court, of \$1273.65. This amount should be deducted from the award given at this stage.
6. As seen in the summary, fees and costs break down as follows:

Attorney's Fees

John Sullivan:	\$3,400.00
Charles Carpenter:	\$55,174.20
Amber Lamb (paralegal):	\$1,104.00

Subtotal:	\$60,218.20
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Expert Fees

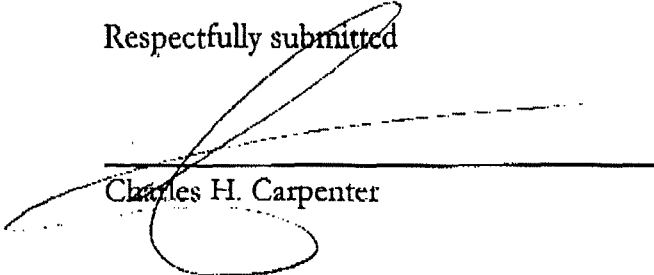
Stimpson:	\$9,969.50
-----------	------------

Grandy:	\$3,586.00
McPherson:	\$6,631.84
Subtotal:	\$20,187.34
Mediator:	
Reinhardt:	\$2,195.00
Other Charges:	\$10,614.28
Total:	\$93,214.82

7. My paralegal Amber Lamb and I have both spent substantially more time on the matter than is shown on the summary attached. In addition to the costs listed above - which are passed through the client- I incurred considerable costs for automated legal research. Because it is not my practice to bill clients for such costs, I have not included them here. I regard such costs as a part of my standard hourly rate.

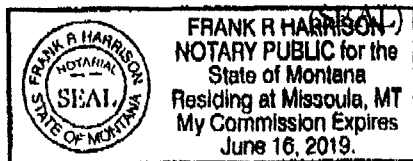
DATED this 14th day of June, 2016.

Respectfully submitted


Charles H. Carpenter

SUBSCRIBED AND SWORN TO
before me this 14th day of June, 2016

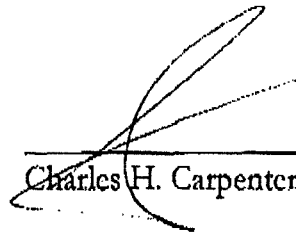

NOTARY PUBLIC



CERTIFICATE OF SERVICE

I hereby certify on the 14th day of June, 2016, I served the foregoing by mailing,
by fax and by email to:

Peter J. Johnson
JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317



Charles H. Carpenter

Charles H. Carpenter
210 N. Higgins Avenue
Higgins Building, Suite 336
Missoula, MT 59802

Invoice submitted to:

June 14, 2016

Invoice #481

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
2/1/2014 Revised Defendant's Motion- cases cited	2.30 280.00/hr	644.00
2/2/2014 Email conference with P. Johnson re: expert deposition	0.20 280.00/hr	56.00
2/8/2014 Grandy: Reviewed summery judgment, attachments	1.50 220.00/hr	330.00
2/9/2014 Conference with L. Grandy re: opposition	0.40 280.00/hr	112.00
Grandy: file transfer and phone conference with C. Carpenter	1.00 220.00/hr	220.00
2/10/2014 Conference with Johnson's office re: depositions	0.40 280.00/hr	112.00
Accident Investigation and Reconstruction--- Review major/ minor maintenance and alterations, regs and installation	4.40 285.00/hr	1,254.00
2/14/2014 Richard McPherson- Document reviews and disc from Peter Johnson	6.00 211.88/hr	1,271.28
Accident Investigation and Reconstruction-- Review Hiller UH-12E cabin and cockpit payout and accident info.	4.60 285.00/hr	1,311.00
2/15/2014 Reviewed Sommers file	1.30 280.00/hr	364.00

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
2/18/2014 Conference with D. Stimpson re: deposition	0.20 280.00/hr	56.00
Fax to P. Krinitt re: schedule, strategy	0.50 280.00/hr	140.00
Conference with R. McPherson re: damages, exhibits	1.00 280.00/hr	280.00
2/22/2014 Richard McPherson- Letter from Amber with discs of Sommers file to review in dance of Depos etc.	5.30 211.88/hr	1,122.96
2/24/2014 Prepared draft witness list	1.30 280.00/hr	364.00
Conference with E. Knowles re: deposition	0.30 280.00/hr	84.00
Reviewed faxes from P. Krinitt re: strategy, schedule	0.50 280.00/hr	140.00
2/26/2014 Reviewed E. Knowles file in preparation for deposition	0.80 280.00/hr	224.00
Conference with P. Krinitt re: schedule, depositions	0.30 280.00/hr	84.00
Conference with D. Schoeggl re: securing evidence	0.80 280.00/hr	224.00
Conference with P. Johnson re: depositions	0.20 280.00/hr	56.00
2/27/2014 Prepared memorandum to P. Krinitt re: schedule, strategic concerns	1.70 280.00/hr	476.00
Email conference with P. Johnson re: deposition scheduling	0.10 280.00/hr	28.00
Accident Investigation and Reconstruction-- Phone call, review and analysis of file	0.90 255.00/hr	229.50
2/28/2014 Accident Investigation and Reconstruction-- Research time, distance, and performance for accident flight	4.50 285.00/hr	1,282.50
3/1/2014 Memo to P. Krinitt re: strategy	0.60 280.00/hr	168.00
3/3/2014 Conference with Johnson re: depositions, mediation	0.20 280.00/hr	56.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
3/3/2014 Accident Investigation and Reconstruction-- review file	1.00 255.00/hr	255.00
Accident Investigation and Reconstruction-- research and review technical data	3.90 220.00/hr	858.00
3/4/2014 Prepared for depositions	1.70 280.00/hr	476.00
3/6/2014 Conference with P. Johnson re: mediation, schedule	0.20 280.00/hr	56.00
3/7/2014 Accident Investigation and Reconstruction -- research and review technical data/ copy additional photo and documents and send to Peter Johnson	3.30 220.00/hr	726.00
3/9/2014 Prepared for deposition, travel	4.20 280.00/hr	1,176.00
3/10/2014 Meeting with R. McPherson re: expert reports; meeting with D. Stimson	5.80 280.00/hr	1,624.00
Richard McPherson- Reviewing with Doug Stimpson	4.00 211.88/hr	847.52
Accident Investigation and Reconstruction -- conferences, phone calls and review file	3.30 255.00/hr	841.50
Accident Investigation and Reconstruction -- research and review technical data, deposition preparation and assistance	2.90 220.00/hr	638.00
Accident Investigation and Reconstruction -- meetings and deposition prep	4.50 285.00/hr	1,282.50
3/11/2014 Depositions of Somers and Stimson; conference with R. McPherson and P. Krinitt	8.30 280.00/hr	2,324.00
Richard McPherson- Somers and Stimpson Depositions Johnson "I heard Charlie was bringing his handyman"	8.00 211.88/hr	1,695.04
Accident Investigation and Reconstruction -- phone calls and conference	0.70 255.00/hr	178.50
Accident Investigation and Reconstruction -- research and review technical data/ deposition preparation and assistance	1.10 220.00/hr	242.00
3/12/2014 Reviewed, revised witness list	1.00 280.00/hr	280.00
Richard McPherson- Notes and updates	4.00 211.88/hr	847.52

Page 4

	<u>Hrs/Rate</u>	<u>Amount</u>
3/13/2014 Grandy- Phone conference with C. Carpenter	0.90 220.00/hr	198.00
3/16/2014 Conference with E. Knowles re: schedule	0.10 280.00/hr	28.00
3/20/2014 Conference with D. Schoeggl re: Pope testimony	0.30 280.00/hr	84.00
3/22/2014 Draft opposition brief	1.00 280.00/hr	280.00
3/23/2014 Grandy- Prepared affidavit; reviewed record	5.00 220.00/hr	1,100.00
3/25/2014 Reviewed Grandy affidavit; conference with L. Grandy	0.80 280.00/hr	224.00
3/27/2014 Revised draft brief; reviewed deposition transcripts	3.90 280.00/hr	1,092.00
3/28/2014 Grandy- Phone conference with C. Carpenter	0.40 220.00/hr	88.00
3/30/2014 Grandy- Reviewed depositions and exhibits	3.20 220.00/hr	704.00
3/31/2014 Grandy- Revised affidavit, reviewed record	4.30 220.00/hr	946.00
Accident Investigation and Reconstruction -- research and review Spokane time and date audio	2.80 220.00/hr	616.00
4/1/2014 Scheduling conference, conference with P. Krinltt	0.40 280.00/hr	112.00
4/3/2014 Reviewed Stimpson affidavit	0.20 280.00/hr	56.00
A. Lamb Formatted Grandy affidavit	0.40 60.00/hr	24.00
4/7/2014 Revised Draft opposition brief	2.30 280.00/hr	644.00
4/8/2014 Revised Draft opposition brief	1.40 280.00/hr	392.00
Richard McPherson- Review Colin Sommers Deposition	6.50 211.88/hr	1,377.22

Page 5

	<u>Hrs/Rate</u>	<u>Amount</u>
4/10/2014 A. Lamb- Assembled exhibits to opposition	2.70 60.00/hr	162.00
4/11/2014 Finalized, filed opposition brief	1.70 280.00/hr	476.00
A. Lamb- Finalized opposition brief	2.10 60.00/hr	126.00
4/15/2014 Conference with J. Spencer re: exhibit errors	0.20 280.00/hr	56.00
4/16/2014 Reviewed Johnson errata	0.20 280.00/hr	56.00
4/18/2014 Corrected exhibits	0.50 280.00/hr	140.00
5/1/2014 Conference with P. Johnson re: mediation	0.10 280.00/hr	28.00
5/5/2014 Scheduling conference on motion for summary judgment	0.30 280.00/hr	84.00
5/9/2014 Reviewed reply brief, motion to strike; cases cited	2.40 280.00/hr	672.00
5/18/2014 Draft opposition to motion	2.00 280.00/hr	560.00
5/19/2014 Revised draft opposition to motion to strike	3.10 280.00/hr	868.00
5/20/2014 Finalized draft opposition	1.10 280.00/hr	308.00
Accident Investigation and Reconstruction -- phone calls	0.50 255.00/hr	127.50
5/22/2014 Reviewed Krinitt notes on briefs; conference with P. Krinitt re: argument	1.20 280.00/hr	336.00
5/29/2014 Hearing preparation, travel to Karmiah	4.30 280.00/hr	1,204.00
5/30/2014 Hearing; conference with P. Krinitt re: hearing; conference with P. Johnson re: settlement; travel	6.20 280.00/hr	1,736.00
6/4/2014 Conference with P. Johnson re: mediation	0.20 280.00/hr	56.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
6/16/2014 Conference with P. Johnson and T. Rabun re: mediation	0.30 280.00/hr	84.00
6/17/2014 Email exchange with P. Johnson re: mediation	0.20 280.00/hr	56.00
6/26/2014 Conference with P. Johnson re: potential deposition dates	0.20 280.00/hr	56.00
7/9/2014 Reviewed ruling; conference with P. Krinitt re: ruling, strategy	1.80 280.00/hr	504.00
7/28/2014 Draft notice of appeal	0.40 280.00/hr	112.00
A. Lamb- filed in parts of notice of appeal	0.80 60.00/hr	48.00
7/30/2014 conference with P. Krinitt re: strategy	0.50 280.00/hr	140.00
8/1/2014 A. Lamb- Reviewed notice of appeal	0.30 60.00/hr	18.00
Reviewed notice of appeal	0.40 280.00/hr	112.00
8/4/2014 A. Lamb- Reviewed documents to be designated to calculate fees	0.30 60.00/hr	18.00
8/6/2014 Conference with P. Krinitt re: appeal issues	0.30 280.00/hr	84.00
8/8/2014 A. Lamb- Conference with N. Kinzer re: fees and record issues	0.20 60.00/hr	12.00
Finalized, filed notice of appeal	0.30 280.00/hr	84.00
8/19/2014 Conference with P. Krinitt re: appeal issues	0.50 280.00/hr	140.00
8/22/2014 Reviewed dismissed order	0.20 280.00/hr	56.00
8/25/2014 Prepared motion for revised final judgment; draft order	0.40 280.00/hr	112.00
9/4/2014 Conference with N. Kinzer re: revised judgment	0.10 280.00/hr	28.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
9/5/2014 Reviewed revised final judgment	0.10 280.00/hr	28.00
9/9/2014 Finalized, filed amended notice of appeal	0.20 280.00/hr	56.00
10/14/2014 Reviewed request for additional documents	0.10 280.00/hr	28.00
10/20/2014 A. Lamb- Prepared request to add documents to record	0.50 60.00/hr	30.00
Reviewed request	0.20 280.00/hr	56.00
10/27/2014 Prepared, filed objection, notice re: record	0.30 280.00/hr	84.00
10/29/2014 A. Lamb- Prepared proposed order	0.20 60.00/hr	12.00
Hearing on record issues	0.20 280.00/hr	56.00
10/30/2014 Revised proposed order; shared draft with P. Johnson	0.20 280.00/hr	56.00
11/10/2014 Reviewed record notice, due date; conference with P. Krinit	0.30 280.00/hr	84.00
11/16/2014 Research re: appeal issues	2.70 280.00/hr	756.00
11/20/2014 Research re: opening brief	3.10 280.00/hr	868.00
A. Lamb- assembled record	1.30 60.00/hr	78.00
11/23/2014 Draft summary judgment brief	1.70 280.00/hr	476.00
11/26/2014 Revised draft brief; email exchange with N. Kinzer re: record	3.70 280.00/hr	1,036.00
11/28/2014 Revised appeal brief	3.50 280.00/hr	980.00
12/1/2014 Revised draft brief	2.10 280.00/hr	588.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
12/4/2014 Revised brief	4.00 280.00/hr	1,120.00
12/5/2014 A. Lamb prepared brief, record	2.50 60.00/hr	150.00
Reviewed brief	1.70 280.00/hr	476.00
12/8/2014 Finalized, filed brief; draft, filed motion to argument	1.60 280.00/hr	448.00
A. Lamb Finalized brief	3.20 60.00/hr	192.00
12/11/2014 Reviewed email from P. Johnson re: extnsion; conference with P. Krinitt	0.20 280.00/hr	56.00
12/16/2014 Reviewed order on extension	0.10 280.00/hr	28.00
1/29/2015 Conference with P. Johnson re: augmenting record; extending time for reply	0.20 280.00/hr	56.00
2/2/2015 Reviewed motion to augment; attachments	0.50 280.00/hr	140.00
2/4/2015 Conference with P. Johnson re: errors in brief; revised F&G brief, cases cited	2.80 280.00/hr	784.00
2/6/2015 Draft motion to extend time	0.20 280.00/hr	56.00
2/9/2015 Finalized motion to extend time	0.10 280.00/hr	28.00
2/13/2015 Reviewed order and motion to extend time	0.10 280.00/hr	28.00
2/27/2015 Research re: reply brief	1.90 280.00/hr	532.00
2/28/2015 Research re: reply brief; reviewed record	2.10 280.00/hr	588.00
3/4/2015 Draft reply brief; revised record	3.60 280.00/hr	1,008.00
3/5/2015 Draft reply brief	2.80 280.00/hr	784.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
3/6/2015 Revised draft reply brief	1.90 280.00/hr	532.00
3/8/2015 Revised draft brief	2.10 280.00/hr	588.00
3/9/2015 Revised brief, email exchange with P. Johnson re: omitted exhibit	1.40 280.00/hr	392.00
3/10/2015 Conference with N. Kinzer re: exhibits; conference with A. Lamb re: motion	0.20 280.00/hr	56.00
A. Lamb- Draft motion to add documents to record	0.50 60.00/hr	30.00
3/11/2015 A. Lamb- Filed motion to argument; filed reply brief	1.20 60.00/hr	72.00
3/20/2015 Reviewed order on record	0.10 280.00/hr	28.00
3/23/2015 Reviewed order on retention	0.10 280.00/hr	28.00
4/30/2015 Reviewed order retaining case; conference with P. Krinitt	0.20 280.00/hr	56.00
5/13/2015 Reviewed notice re: hearing date; email exchange with P. Johnson regarding schedule	0.30 280.00/hr	84.00
5/14/2015 Responded to hearing notice	0.10 280.00/hr	28.00
6/9/2015 Reviewed order setting case; responded to order; reviewed amended order; responded to amended order	0.20 280.00/hr	56.00
6/15/2015 Conference with D. Schoeggl, P. Krinitt regarding storage of evidence	0.30 280.00/hr	84.00
8/17/2015 Conference with K. Lehman at Supreme Court re: filing	0.20 60.00/hr	12.00
8/26/2015 Reviewed briefs and cases cited in briefs in preparation for oral argument	4.70 280.00/hr	1,316.00
8/27/2015 Travel to Moscow; prepare for oral argument	7.20 280.00/hr	2,016.00
8/28/2015 Oral argument; conference with P. Johnson re: settlement; conference with P. Krinitt re: hearing, settlement; travel	5.30 280.00/hr	1,484.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
9/24/2015 Reviewed notice of decision	0.10 280.00/hr	28.00
9/25/2015 Reviewed decision; conference with P. Krinit	1.20 280.00/hr	336.00
10/2/2015 Draft memo to P. Krinit re: settlement strategy; legal issues	1.30 280.00/hr	364.00
10/8/2015 Research re: memorandum of costs	1.80 280.00/hr	504.00
10/9/2015 Finalized, filed memorandum of costs	0.40 280.00/hr	112.00
A. Lamb research re: memorandum of costs	1.10 60.00/hr	66.00
10/16/2015 A. Lamb prepared amended memorandum of costs	0.30 60.00/hr	18.00
10/19/2015 A. Lamb Conference with S. Velasquez at Supreme Court re: costs; conference with C. Carpenter re: corrected memo	0.40 60.00/hr	24.00
11/4/2015 Conference with S. Nutsch re: potential mediators; memo to P. Krinit re: potential mediators	0.40 280.00/hr	112.00
11/9/2015 Revised scheduling order	0.10 280.00/hr	28.00
11/16/2015 Email exchange with P. Johnson re: mediation	0.10 280.00/hr	28.00
11/17/2015 Email exchange with P. Johnson re: mediation	0.20 280.00/hr	56.00
11/19/2015 Scheduling conference with Judge Fitzmaurice; conference with P. Krinit	0.80 280.00/hr	224.00
11/20/2015 Reviewed form scheduling order	0.20 280.00/hr	56.00
12/15/2015 Reviewed Johnson letter re: mediators	0.20 280.00/hr	56.00
12/22/2015 A. Lamb gathered information re: mediators	0.40 60.00/hr	24.00
12/23/2015 Draft letter to Judge Fitzmaurice re: mediators	0.40 280.00/hr	112.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
12/30/2015 email exchange with N. Kinzer, P. Johnson re: schedule	0.10 280.00/hr	28.00
1/13/2016 Conference with Judge Fitzmaurice; call with P. Krinitt	0.80 280.00/hr	224.00
1/14/2016 Conference with P. Johnson re: mediation, venue	0.50 280.00/hr	140.00
1/15/2016 Conference with P. Johnson re: mediation	0.30 280.00/hr	84.00
1/21/2016 Conference with P. Krinitt re: legal issues, strategy	0.80 280.00/hr	224.00
1/22/2016 Conference with P. Krinitt re: legal issues, strategy	0.70 280.00/hr	196.00
1/26/2016 email exchange with P. Johnson re: arrangements for mediation	0.20 280.00/hr	56.00
1/28/2016 email exchange with P. Johnson re: mediation arrangements	0.20 280.00/hr	56.00
1/31/2016 Memo to P. Krinitt re: mediation, strategy	0.80 280.00/hr	224.00
2/3/2016 Email conference with Judge Reinhardt	0.20 280.00/hr	56.00
2/11/2016 Conference with P. Krinitt, reviewed faxes re: mediation strategy	1.10 280.00/hr	308.00
2/12/2016 Conference with A. Lamb re: travel arrangements	0.20 280.00/hr	56.00
2/19/2016 Draft mediation statement	1.70 280.00/hr	476.00
2/25/2016 Conference with P. Krinitt re: Mediation statement	0.80 280.00/hr	224.00
2/26/2016 Finalized draft mediation statement	1.10 280.00/hr	308.00
2/29/2016 Reinhardt -- Reviewed statements	1.35 200.00/hr	270.00
3/1/2016 Reinhardt-- Reviewed statements	1.00 200.00/hr	200.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
3/1/2016 John Sullivan: Conference with client re: strategy; reviewed documents	1.50 400.00/hr	600.00
3/2/2016 Travel to mediation; mediation, conference with counsel; counsel with P. Krinitt in advance and after mediation	8.70 280.00/hr	2,436.00
Mediation Session	2.00 200.00/hr	400.00
Travel to Mediation	6.75 100.00/hr	675.00
Travel to Boise	6.50 100.00/hr	650.00
John Sullivan: Mediation, client conference; travel to and from mediation site.	7.00 400.00/hr	2,800.00
3/3/2016 Travel from mediation; research re: immunity	4.80 280.00/hr	1,344.00
3/8/2016 Preparation for mediation	1.50 280.00/hr	420.00
3/10/2016 Research re: immunity defense	2.70 280.00/hr	756.00
3/12/2016 Research re: waiver, immunity, revised record	1.70 280.00/hr	476.00
3/14/2016 Draft memo on immunity, waiver	2.80 280.00/hr	784.00
3/19/2016 Reviewed motion for summary judgment	2.30 280.00/hr	644.00
Draft brief in opposition	1.40 280.00/hr	392.00
4/1/2016 Revised draft brief	1.30 280.00/hr	364.00
4/12/2016 Revised draft opposition brief	1.50 280.00/hr	420.00
4/13/2016 Finalized; filed opposition brief	2.10 280.00/hr	588.00
4/25/2016 Revised reply brief, cases cited therein	2.10 280.00/hr	588.00

00103

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	<u>Hrs/Rate</u>	<u>Amount</u>
4/29/2016 Reviewed reply brief	0.90 280.00/hr	252.00
5/1/2016 Travel, hearing preparation	4.20 280.00/hr	1,176.00
5/2/2016 Hearing, conference with P. Johnson re; settlement; travel	4.60 280.00/hr	1,288.00
For professional services rendered	330.70	\$82,600.54
Additional Charges :		
12/8/2013 Service		54.94
Copies		120.92
3/3/2014 Accident Investigation and Reconstruction, Inc.-- Copying cost		566.87
3/7/2014 Copies		47.50
Flights and lodging in Denver		642.00
Ground Transportation		50.00
Accident Investigation and Reconstruction, Inc.-- FedEx		68.62
3/9/2014 Richard McPherson- Airfare Lodging, Per Diem, Expenses, Ground Transportation		900.00
3/10/2014 Copies		63.30
3/11/2014 Deposition Transcripts		93.89
3/12/2014 Meals in Denver		115.00
Ground transportation		50.00
3/29/2014 Hotel		62.50
Mileage		83.60
3/30/2014 Mileage		108.90
4/4/2014 Grandy- Delivery		40.00
3/11/2015 copies		60.92
delivery		51.85

Page 14

	<u>Amount</u>
3/17/2015 Fee for added documents	48.00
Copies	68.40
8/27/2015 Mileage	138.10
Meals	40.16
Hotel	115.68
8/28/2015 Mileage	158.10
Meals	26.50
3/2/2016 Airfare- Carpenter	251.55
Airfare- Reinhardt	762.46
Hotel Carpenter and Reinhardt	210.92
Ground Travel	26.50
Meal Mediation	103.07
Travel to Mediation	39.64
5/1/2016 Lodging, dinner	107.50
Travel Expense	93.25
5/2/2016 Travel Expense	93.20
6/10/2016 Appeal Fee	1,292.00
6/14/2016 Transcript Cost	100.00
Helicopter Storage (Due In July 2016)	3,752.00
Copy CD of transmission	6.44
Total additional charges	<u>\$10,614.28</u>
Total amount of this bill	<u>\$93,214.82</u>
Balance due	<u>\$93,214.82</u>

00105

6/14/2016
3:51 PMCharles H. Carpenter
Totals Only Worksheet

Page 1

Client	Billable: Fees	Unbillable: Fees	Interest Fin charge	Payments Credits	Prior bal
Last bill	Costs	Costs	Tax fees	Wrt offs	New charges
Last charge	Hours	Hours	Tax costs	Refunds	New A/R
Krinit (Bill of Cost)					New bal
	82600.54	0.00	0.00	0.00	0.00
6/14/2016	10614.28	0.00	0.00	0.00	93214.82
481	330.70	0.00	0.00	0.00	0.00
			0.00	0.00	93214.82
Grand Total	82600.54	0.00	0.00	0.00	0.00
	10614.28	0.00	0.00	0.00	93214.82
	330.70	0.00	0.00	0.00	0.00
			0.00	0.00	93214.82

00106

Lewis County District Court

FILED
AT 12:00 CLOCK PM

JUN 20 2016

ALEZIA WINNER
Clerk of District CourtBy  Deputy

PETER J. JOHNSON, ISB # 4105
Johnson Law Group
103 E. Indiana, Suite A
Spokane, WA 99207-2317
Phone: (509) 835-5000
Fax: (509) 326-7503
Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT,

Plaintiff,

v.

IDAHO DEPARTMENT OF FISH AND
GAME and STATE OF IDAHO,

Defendants.

NO. CV 12-146

DEFENDANTS' MOTION TO
DISALLOW A PORTION OF
PLAINTIFF'S COSTS AND ATTORNEY
FEES

[Oral Argument Requested]

Defendants (hereinafter "IDFG"), by and through their attorney of record, Peter J. Johnson of Johnson Law Group, respectfully move the Court to disallow a portion of Plaintiff's costs and attorney fees. This motion is based upon the memorandum of authorities and the file and pleadings herein.

DATED: June 20, 2016.

JOHNSON LAW GROUP

By: 

PETER J. JOHNSON
Attorney for Defendants

DEFENDANTS' MOTION TO DISALLOW COSTS - 1

JOHNSON LAW GROUP

103 E. Indiana, Suite A
Spokane, WA 99207-2317

TEL: (509) 835-5000 FAX: (509) 326-7503


00107

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of June, 2016, I caused to be served a copy of the foregoing
by the method indicated below and addressed to the following:

Charles H. Carpenter
Carpenter Law Firm, PLC
210 N. Higgins Avenue, Suite 336
Missoula, MT 59802
Phone: (406) 543-0511
Fax: (406) 258-0365

☐ U.S. Mail
☐ Hand Delivery
☒ Facsimile
☐ Federal Express


PETER J. JOHNSON

\\X:\1760\Trial Court\Plg\MT - Disallow Costs (2016-06-17).wpd

DEFENDANTS' MOTION TO DISALLOW COSTS - 2

JOHNSON LAW GROUP

103 E. Indiana, Suite A
Spokane, WA 99207-2317
TEL: (509) 835-5000 FAX: (509) 326-7503

00108

PETER J. JOHNSON, ISB # 4105
 Johnson Law Group
 103 E. Indiana, Suite A
 Spokane, WA 99207-2317
 Phone: (509) 835-5000
 Fax: (509) 326-7503
 Attorneys for Defendants

Lewis County District Court
FILED
 AT 128 O'CLOCK PM

JUN 20 2016

ALESIA WINNER
 Clerk of District Court

By

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT,

Plaintiff,

v.

IDAHO DEPARTMENT OF FISH AND
 GAME and STATE OF IDAHO,

Defendants.

NO. CV 12-146

DEFENDANTS' MEMORANDUM IN
 SUPPORT OF MOTION TO
 DISALLOW CERTAIN OF
 PLAINTIFF'S SUBMITTED COSTS
 AND ATTORNEYS FEES

[Oral Argument Requested]

Defendants (hereinafter "IDFG") respectfully move this Court to disallow certain costs and attorney fees submitted by Plaintiff.

I.R.C.P. 16(I) permits the Court to assess reasonable expenses to include attorney fees under the circumstances enumerated therein and consistent with Idaho law. In its decision, the Court required Plaintiff to file a memorandum of costs and attorney fees pursuant to I.R.C.P. 54. The Court indicated it would then consider all expenses and fees incurred by plaintiff after January 31,

DEFENDANTS' MEMORANDUM IN SUPPORT OF
 MOTION TO DISALLOW COSTS AND FEES - 1

JOHNSON LAW GROUP
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 TEL: (509) 835-5000 FAX: (509) 326-7503

00109

2014.

I.R.C.P. 54(a)(1) provides that a court may award reasonable attorney fees to the prevailing party. The Plaintiff is not the prevailing party in this matter. Nonetheless, whether the Court proceeds under I.R.C.P. 54(e)(1) or I.R.C.P. 16(I), the guideline must be the reasonableness of the fees and expenses. Although IDFG respectfully submits that the Court's decision awarding fees and costs since January 31, 2014, is not appropriate for the reasons outlined in the motion for reconsideration, IDFG submits that the fees and costs requested by Plaintiff are not reasonable or appropriate and therefore objects to certain of the fees and costs contained in Plaintiff's "verified memorandum of costs and attorney fees."

It is IDFG's belief that Plaintiff's counsel is on a contingent fee basis. While this fact does not preclude an assessment of reasonable fees under Idaho law, the assessment should not provide Plaintiff with a windfall when he is not the prevailing party. That said, IDFG will address the requests similar to the categories outlined in Plaintiff's memorandum.

A. Attorney Fees

1. John Sullivan

The plaintiff seeks attorney fees for John Sullivan of \$3,400. First, there is no proof that Plaintiff incurred any such fee. Second, Mr. Sullivan is not an attorney of record nor to IDFG's knowledge is he licensed to practice law in the State of Idaho. Third, it appears his function was limited to the Court-ordered mediation, which IDFG agreed to attend in California. Furthermore, the time and rate are unreasonable for a mediation that lasted approximately four hours. IDFG respectfully requests that the Court disallow this claim.

2. Charles Carpenter

DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISALLOW COSTS AND FEES - 2

JOHNSON LAW GROUP

103 E. Indiana, Suite A
Spokane, WA 99207-2317

TEL: (509) 835-3000 FAX: (509) 326-7503

The Court has discretion to determine a reasonable rate for Mr. Carpenter's time. IDFG believes the requested rate is high, but will leave it to the Court to set a reasonable rate. Furthermore, IDFG does not intend to nitpick each of Mr. Carpenter's entries as they relate to his time on certain portions of the case. IDFG merely wishes to remind the Court that it indicated it would consider fees incurred by Plaintiff after January 31, 2014. However, the Court should not consider any time from March 3, 2016, forward. Mr. Carpenter's time during this period was devoted to addressing IDFG's motion seeking a dismissal based upon the statutory employer's immunity. The Court granted this motion but awarded fees and costs based upon its determination that this motion should have been filed on or before January 31, 2014. Without conceding this point, Mr. Carpenter would have incurred this time in responding to the motion irrespective of when it was filed. Pursuant to Plaintiff's memorandum, Mr. Carpenter spent 33.9 hours related to the motion. Based upon the requested hourly fee, attorney Carpenter's total should be reduced \$9,492.

B. Expert Fees

1. Mr. Stimpson and Mr. Grandy

IDFG is unable to address the amounts attributable to these experts as no invoices or time records were provided to review nor was any proof of payment submitted. In addition, I.R.C.P. 54(d)(1)(C)(8) provides that expert costs are limited to \$2,000 per expert unless I.R.C.P. 54(d)(1)(D) applies. IDFG respectfully requests that these expenses be limited to a total of \$4,000.

2. Mr. McPherson

The plaintiff indicates that Mr. McPherson was a consulting expert. Again, IDFG does not have any basis to assess his charges since he was never disclosed as an expert of any type, his curriculum vitae has not been provided, no invoices or time records have been provided and no proof

DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISALLOW COSTS AND FEES - 3

JOHNSON LAW GROUP
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Spokane, WA 99207-2317
TEL: (509) 835-5000 FAX: (509) 326-7503

of payment has been submitted. IDFG submits that this expense of \$6,631.84 be disallowed.

C. Expenses

1. Mr. McPherson

Any expenses attributable to Mr. McPherson for the trip to Denver for the depositions of Mr. Stimpson and Mr. Sommer should not be considered. These expenses appear to be \$900.

2. Helicopter Storage

IDFG does not have any invoice or other accounting upon which to properly analyze this claim. IDFG submits that these expenses of \$3,752.00 be disallowed.

D. Summary

1. Attorney fees to disallow (\$9,402 + \$3,400)	\$ 12,892.00
2. Expert witness fees to disallow (Mr. McPherson)	\$ 16,187.34
3. Expenses to disallow	\$ 4,652.00
Mr. McPherson -- \$900.00	
Helicopter storage -- \$3,752.00	
Total	\$ 33,731.34

E. Credits

In addition, IDFG previously paid costs awarded by the Supreme Court in the amount of \$1,273.65. IDFG also paid \$1,100 for the time charged by its expert, Colin Sommer, for the deposition taken by Plaintiff counsel because Plaintiff failed to pay for his time. (See attached).

Without waiving its position that the Court should not assess any fees or costs, IDFG respectfully requests that the Court set a reasonable rate less than \$280 per hour for Mr. Carpenter and that the Court disallow \$36,104.99 from Plaintiff's memorandum before determining what amount it will consider.

DATED: June 20, 2016.

DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISALLOW COSTS AND FEES - 4

JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317
TEL: (509) 835-5000 FAX: (509) 326-7503

JOHNSON LAW GROUP

By: PETER J. JOHNSON
Attorney for DefendantsCERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2016, I caused to be served a copy of the foregoing
by the method indicated below and addressed to the following:

Charles H. Carpenter
Carpenter Law Firm, PLC
210 N. Higgins Avenue, Suite 336
Missoula, MT 59802
Phone: (406) 543-0511
Fax: (406) 258-0365

☐ U.S. Mail
☐ Hand Delivery
☒ Facsimile
☐ Federal Express


PETER J. JOHNSON

[X:\1760\Trial Court\Pldg\MEM - Disallow Costs (2016-06-17).wpd]

DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISALLOW COSTS AND FEES - 5

JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317
TEL: (509) 835-5000 FAX: (509) 326-7503

00113



AEROSCOPE, INC.

11901 Allison Street
Broomfield CO 80020
303-465-4414 Fax # 303-465-4116
kdean@aeroscopeinc.com

Peter J. Johnson
Johnson Law Group
103 E. Indiana Ste A
Spokane, WA 99207

INVOICE

3/19/2014	10313
-----------	-------

CRIME NAME	Krinit
AMOUNT	\$1,100.00



AEROSCOPE, INC.

11901 Allison Street
Broomfield CO 80020

PLEASE INCLUDE THE CASE NAME or DETACH AND RETURN TOP
PORTION WITH YOUR PAYMENT.

Due on receipt		Krinit
3/11/2014	C. Sommer Testimony Half Day	1,100.00 pol #17398
	Total	\$1,100.00

pc 10/17
#17378

Charles H. Carpenter
Idaho Bar No. 8322
Carpenter Law Firm plc
210 N. Higgins Avenue Suite 336
Missoula, Montana 59802
(406) 543-0511
carpentc@carpenterlawfirmplc.com

Lewis County District Court

FILED
AT 12:20 O'CLOCK PM

JUN 29 2016

ALEXIA WINNER
Clerk of District CourtBy [Signature] Deputy*Attorney for Plaintiff*

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT
LEWIS COUNTY

PERRY KRINITT)

No. CV 12-146

Plaintiff,)

v.)

IDAHO DEPARTMENT OF)
FISH AND GAME, and)
STATE OF IDAHO,)

Defendants.)

MEMORANDUM IN
OPPOSITION TO MOTION
TO DISALLOW CERTAIN COSTS

Pursuant to the Court's order of June 1, 2016, Plaintiff Krinitt filed a verified memorandum of costs. The Idaho Department of Fish & Game ("Fish & Game") has objected to a number of these costs. Some of Fish & Game's objections are well taken and Krinitt does not dispute them. This opposition is limited to three items in the motion: D.1 (attorney's fees) D.3(a) (McPherson's travel expenses) and E (a credit for payment to Mr. Sommer).

00115

With respect to attorney's fees, Fish & Game makes three objections: it asks that John Sullivan's work in connection with the mediation be disallowed entirely, and that Charles Carpenter's rate be reduced, and certain time disallowed. With respect to Sullivan, Krinitt has limited his claim for costs to the legal work Sullivan did in connection with the mediation, which took place in Orange County, California. Carpenter found Sullivan's work to be valuable – see Exhibit A – and Fish & Game has no basis for claiming that it was not.

Krinitt objects to the assertion that Carpenter's standard hourly rate is unreasonably high. Attached hereto as exhibits B and C are filings made in other cases by other attorneys, a few years ago, which show Carpenter's rate to be within the reasonable range. Fish & Game also objects to fees and costs incurred in connection with its untimely Motion for Summary Judgment, on the grounds that these fees and costs would still have been incurred if Fish & Game had timely filed its motion. This is less than half right. Krinitt's counsel, and the Court, spent significant time and attention on the question whether Fish & Game had waived its statutory immunity defense by litigating fault all the way to the Supreme Court, blowing every deadline there was. Obviously this time, like the time arguing over fees, costs and whether there should be any sanction at all, would not have happened if Fish & Game had timely filed.

Fish & Game also objects to the travel costs associated with Richard McPherson, of Downrange. Mr. McPherson's assistance in connection with Fish &

Game's Motion for Summary Judgment on fault was also valuable – see Exhibit A – while his other work has not been included in the claim for costs. Fish & Game's counsel met Mr. McPherson at the depositions in Denver.

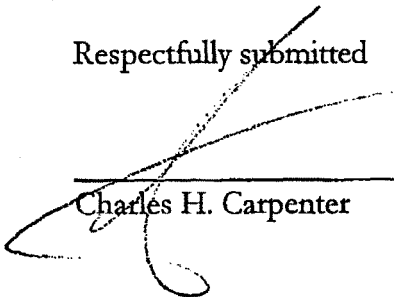
Finally, Fish & Game seeks a credit for the amounts it paid to its expert. The facts stated by Fish & Game in connection with this payment are true, but it is not entitled to a credit. Had Krinitt paid Mr. Sommers' bill, he would have included the fee in his claim, and Fish & Game would have to pay it. As it is, the item, having already been paid by Fish & Game, is not included. This should not be a credit, because it is a wash.

CONCLUSION

For the reasons given above, and in Fish & Game's motion, Krinitt's claim for costs and fees should be reduced by the amounts set forth in the motion at D.2 (\$16,187.34) and D.5(6) (\$3,772.00) and no further.

DATED this 29th day of June, 2016.

Respectfully submitted

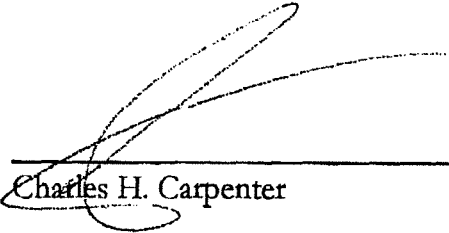


Charles H. Carpenter

CERTIFICATE OF SERVICE

I hereby certify on the 29th day of June, 2016, I served the foregoing by mailing,
by fax and by email to:

Peter J. Johnson
JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317



Charles H. Carpenter

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KEVIN E. MAYS,

Plaintiff,

v.

TODD STOBIE, MIKE RIGNEY,
DONALD BLAIR, JOHN
HILDERBRAND, JOE
RODRIGUEZ, DALE BUTTREY,
JACK MCGEE, RICHARD SMITH,
GABE RICHARDSON, JACLYN
MARTIN, JAMIE ROMER, JODY
BROWN, JACOB GUNTER, NEZ
PERCE COUNTY, a political
subdivision of the State of Idaho, and
the CITY OF LEWISTON, a
municipality incorporated in the State
of Idaho,

Defendants.

Case No. 3:08-cv-00552-EJL-CWD

**REPORT AND
RECOMMENDATION**

INTRODUCTION

Following a six-day trial, the jury in this case returned a special verdict finding Defendant Donald Blair liable for using excessive force against Plaintiff Kevin Mays, and awarded damages in the amount of \$1,954.27. (Dkt. 212.) This matter is before the Court on Plaintiff's Petition for Award of Attorney Fees, (Dkt. 218), in which Plaintiff seeks attorney's fees under 42 U.S.C. § 1988 in the amount of \$439,678.26. Defendant Blair

REPORT AND RECOMMENDATION - 1

filed an objection to Plaintiff's request for fees. (Dkt. 226.) The Court heard oral arguments on Plaintiff's petition on December 12, 2011. Having considered the parties' arguments, briefing, affidavits and other materials submitted in support of or in opposition to Plaintiff's petition, and for the reasons set forth below, the undersigned will recommend that the District Judge grant Plaintiff's petition in part and award \$84,791.41 in attorney's fees.

BACKGROUND

The facts and procedural history of this case are well known to the parties and the Court repeats them here only as necessary to resolve the fee petition. Plaintiff Kevin Mays brought this civil rights action under 42 U.S.C. § 1983 against Officers Donald Blair, Mike Rigney, and Todd Stobie of the Lewiston Police Department and Deputies Joe Rodriguez and John Hildebrand of the Nez Perce County Sheriff's Department for events that occurred on December 23, 2006.¹ On that date, the Lewiston Police Department received a call from Angel Harrell (Plaintiff's then girlfriend) who reported that Plaintiff may be suicidal and possibly in possession of a firearm. In response to the call, and acting in furtherance of their community care-taking function, Officers Rigney, Stobie, and Blair, and Deputies Hildebrand and Rodriguez removed Plaintiff's children from his home—placing them in the custody of Ms. Harrell—and confronted Plaintiff, who was located near the outskirts of Lewiston.

¹ In his original complaint, (Dkt. 1), Plaintiff also named the City of Lewiston and Nez Perce County as defendants.

REPORT AND RECOMMENDATION - 2

During the confrontation, Plaintiff was forced to the ground, handcuffed, and searched. The search revealed that Plaintiff was not in possession of a firearm. When Plaintiff attempted to stand up after the search was complete, which the officers construed as resistance, one of the officers placed his knee in Plaintiff's back while another pressed Plaintiff's face into the ground and another used his Taser on Plaintiff. Plaintiff sustained a laceration on his head and was taken in an ambulance to the hospital. Plaintiff also received a citation for resisting arrest. After Plaintiff was tried for and acquitted of resisting arrest, he filed suit under 42 U.S.C. § 1983, claiming that he was wrongfully arrested and that the officers used excessive force in violation of the Fourth Amendment. Plaintiff also pled state law claims, including battery and intentional infliction of emotional distress.

Plaintiff's initial complaint related only to the above incident. He later sought, and was granted, leave to amend his complaint to include claims in connection with a second incident that occurred on November 17, 2008, while Plaintiff was incarcerated at the Nez Perce County Jail on charges unrelated to the first incident. The amended complaint asserted claims against members of the Nez Perce County Sheriff's Department who allegedly beat Plaintiff or neglected him during his incarceration. The second incident did not involve the City of Lewiston or Officers Stobie, Rigney, Mundell, or Blair. In his motion for leave to amend, Plaintiff argued that, because he suffered head injuries during both incidents, and "the defendants responsible for the First Incident w[ould] almost

REPORT AND RECOMMENDATION - 3

certainly blame the defendants responsible for the Second Incident, and vice versa[,] . . . [t]rying the[] incidents separately would create a substantial risk of incurring double, multiple, or otherwise inconsistent and inequitable [results].” (*Mem. in Supp. of Pl. ’s Mot. for Leave to Amend Compl.* at 3, Dkt. 20-2.)²

Plaintiff also attempted to amend his complaint to add claims related to a third incident that occurred on June 8, 2009, in which Plaintiff allegedly was harassed at his home by a Lewiston police officer. (*Pl. ’s Second Mot. to Amend Compl.*, Dkt. 44.) Plaintiff later withdrew his motion to include claims related to the third incident. (*Decl. of Jason Wood re: Mot. to Amend*, Dkt. 67.)

Prior to trial, Plaintiff’s claims were significantly narrowed. Early in the litigation, the parties stipulated to the dismissal of Officer Joedy Mundell, (Dkt. 38), and Deputy Dustin Hibbard. (Dkt. 46.) As a result of dispositive motions, both governmental entities were dismissed, all claims related to the second incident were dismissed, and all other causes of action were dismissed with the exception of Plaintiff’s excessive force claim related to the first incident. The case proceeded to trial on Plaintiff’s excessive force claim against Officers Stobie, Rigney, and Blair, and Deputies Hilderbrand and Rodriguez. Officer Stobie was dismissed by the Court as a result of a motion for judgment as a matter of law at the close of Plaintiff’s case in chief. (Dkt. 208.)

² Plaintiff later sought leave to replace fictitiously designated defendants that were named in the amended complaint with the names of eight employees of Nez Perce County, all of whom were allegedly involved in the second incident. (Dkt. 71.) The Court partially granted Plaintiff’s motion on December 7, 2010. (Dkt. 99.)

At the close of the evidence, and after motions were addressed, closing arguments were made, jury instructions were given, the case was submitted to the jury and the jury was presented with a special verdict form. The special verdict form asked the jury to identify which, if any, of the individual officers and deputies had used excessive force. (Dkt. 212.) If the jury found any of the defendants had used excessive force, the special verdict form then asked the jury to identify what damages Plaintiff had suffered and left spaces open for the jury to fill in the amount of "Medical Expenses," "Other Non Economic Damages," and "Nominal Damages" as to each individual defendant. (*Id.*) The special verdict form also asked the jury to determine whether Plaintiff was entitled to an award of punitive damages.

Of the remaining four defendants, the jury found that only Officer Blair had used excessive force and awarded Plaintiff \$1,954.27 for medical expenses. (Dkt. 212.) The Jury also found that Plaintiff was not entitled to an award of punitive damages. Plaintiff now seeks an award of attorney's fees under 42 U.S.C. § 1988 in the amount of \$439,678.26.

DISCUSSION

Under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the court, in its discretion, may award reasonable attorney's fees to the prevailing party in any action or proceeding brought to enforce the provisions of various civil rights statutes, including 42 U.S.C. § 1983. "Congress' intent in enacting § 1988 was to attract

REPORT AND RECOMMENDATION - 5

competent counsel to prosecute civil rights cases, where ‘victims ordinarily cannot afford to purchase legal services at the rates set by the private market.’” *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008) (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986)). Under the terms of the statute, the plaintiff must be a “prevailing party” to recover an award of attorney’s fees. “[P]laintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotations omitted). The United States Court of Appeals for the Ninth Circuit has made clear that, “[e]ven in a case where the ‘[p]laintiff succeeded on only one of his many claims against Defendants,’ . . . the district court must nonetheless calculate a reasonable fee.” *Mendez*, 540 F.3d at 1128.

Generally, attorney’s fees are calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate—known as the “lodestar” calculation—and then, if necessary, making adjustments to the lodestar figure based upon the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir.

1975),³ that have not been subsumed in the lodestar calculation.⁴ *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008).

Defendant Blair concedes that Plaintiff is a prevailing party within the meaning of § 1988. (*Def.'s Objection to Pl.'s Atty Fees* at 2, Dkt. 226.) He argues, however, that this case falls within the exception to the general rule for plaintiffs who achieve purely technical success or receive *de minimis* relief. Under this exception, the Court may forgo the lodestar analysis, *Morales v. City of San Rafael*, 96 F.3d 359, 362 (9th Cir. 1996), and Defendant Blair argues that the Court should significantly reduce the amount of requested fees—or deny the request in its entirety—because the amount of damages awarded by the jury in this case was minimal in comparison to the amount sought by Plaintiff.

Alternatively, if the Court determines that the above exception does not apply, Defendant Blair argues that the time expended on the case and the hourly rates submitted by

³ The twelve *Kerr* factors include: (1) the time and labor required; (2) the complexity of the case; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

⁴ “Among the subsumed factors presumably taken into account in either the reasonable hours component or the reasonable rate component of the lodestar calculation are: (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, . . . (4) the results obtained, and (5) the contingent nature of the fee agreement.” *Morales v. City of San Rafael*, 96 F.3d 359, 364 n. 9 (9th Cir. 1996) (internal quotations and citations omitted).

Plaintiff's counsel in connection with their request for fees are not reasonable and that the outcome of the case warrants a reduction in the amount of fees awarded. For the reasons discussed below, while the Court does not find that the outcome in this case brings it within the exception to the general rule for calculating attorney's fees, the Court does find that Plaintiff's requested fees are unreasonably high and will recommend that they be reduced.

1. Plaintiff's success was neither "purely technical" nor "*de minimis*"

In *Farrar v. Hobby*, 506 U.S. 103 (1992), the United States Supreme Court created an exception to the general rule governing a district court's calculation of attorney's fees in civil rights cases. "The Court held that 'nominal damages' cases in which the relief is *de minimis* are exempted from the general requirements that govern the calculation of attorney's fees, including the requirement that a lodestar first be calculated." *Morales*, 96 F.3d at 362 (citing *Farrar*, 506 U.S. at 116-18 (O'Connor, J., concurring)). "The *Farrar* exception, which would allow the court to dispense with the calculation of a lodestar and simply establish a low fee or no fee at all, is limited to cases in which the civil rights plaintiff 'prevailed' but received only nominal damages and achieved only 'technical' success." *Id.* at 362-63.

In this case, the jury found that Defendant Blair had used excessive force against Plaintiff and awarded \$1,954.27 in compensatory damages for medical expenses incurred by Plaintiff. It is undisputed that the jury was instructed regarding nominal damages and

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was given the option of awarding nominal damages, rejecting that option.

Notwithstanding the award of compensatory damages, Defendant Blair contends that the award of medical expenses in this case was *de minimis*, and that the Court may award low fees or no fees at all under *Farrar*. The Court does not agree. The Ninth Circuit expressly has cautioned the district courts from stretching the Supreme Court's holding in *Farrar* beyond its scope. *See Thomas v. City of Tacoma*, 410 F.3d 644, 648 (9th Cir. 2005).

Farrar carved out an exception to the congressional mandate contained in 42 U.S.C. § 1988—that the prevailing party in a civil rights action recuperate reasonable attorney's fees—where the jury finds a technical constitutional violation and only awards nominal damages. Here, Plaintiff's success can be considered neither purely technical nor *de minimis*.

2. The Lodestar Calculation

“The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This is known as the lodestar calculation. Plaintiff's attorney Jason Wood submits that he devoted 964 hours to the case. He seeks attorney's fees for 819.8 hours of work (subtracting 144.2 hours of work spent exclusively on the second incident) at \$300 per hour. (*Dec. Of Jason Wood* ¶¶ 15 and 16, Dkt. 219.) Plaintiff's attorney Gregory Rauch submits that he spent 750.40 hours on the case and seeks attorney's fees for 712.30 hours of work (subtracting 38.1

hours of work spent exclusively on the second incident) at \$250 per hour. (*Dec. Of Gregory Rauch* ¶ 17, Dkt. 220.) Plaintiff also seeks attorney's fees for work performed by two of Mr. Rauch's partners—Robert Magyar (34.6 hours at \$200 per hour) and Brian Thie (13.7 hours at \$200 per hour). (*Id.* at ¶¶ 19 and 20.) In sum, Plaintiff seeks \$433,675 in attorney's fees plus \$6,003.26 in costs not available under District of Idaho Local Rule 54.1(c)(1) - (9) (but which are available under § 1988) for a total of \$439,678.26.

Defendant Blair argues that, even if the Court does not invoke the exception under *Farrar* for purely technical or *de minimis* success, the time expended and the hourly rates claimed by Plaintiff's attorneys are not reasonable and the fee award should be reduced to between 10 - 15 percent of the full amount requested due to Plaintiff's limited success. As more fully explained below, the Court agrees and will recommend that the fee award be reduced (although not to the extent requested by Defendant).

A. Hourly Rate

Reasonable attorney's fees under § 1988 must be based upon a reasonable hourly rate. *See Hensley*, 461 U.S. at 433. The appropriate rate is the prevailing market rate "in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Chalmers v. Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986).

"[T]he burden is on the fee applicant to produce satisfactory evidence in addition to the attorney's own affidavits that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience

and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

Plaintiff’s counsel Jason Wood and Gregory Rauch both have submitted declarations in support of their petition for attorney’s fees. In his declaration, Mr. Rauch states that he handles “[m]ostly divorce, misdemeanor and felony criminal matters at state level, bankruptcy, and small personal injury cases.” (Dkt. 220 at 2.) Mr. Rauch has been a member of the Idaho State Bar since 2007, and he states that his customary rate is \$175 per hour. (*Id.*) However, for more complicated matters, Mr. Rauch states that he charges \$250 per hour, which is the rate he is seeking in this case. Mr. Rauch characterizes his role in this litigation as “second chair.” It also is apparent from Mr. Rauch’s declaration that, at the time of taking on this case, he was inexperienced in civil rights litigation, which, he indicates, is why he sought the assistance of more experienced counsel.

Mr. Wood has been a member of the Idaho State Bar since 1994. (Dkt. 219 at 2.) In his declaration, Mr. Wood indicates that, since 2001, his practice has focused “primarily on representing plaintiffs throughout the State of Idaho, including civil rights cases involving excessive use of force by police officers” and that he has tried several cases to judgment. (*Id.*) Mr. Wood characterizes this case as complex due to the number of parties involved, multiple incidents, and the uncertainty as to damages. He also indicates that, “[f]rom the beginning of our representation of Kevin Mays, he has been unable to pay me or co-counsel, Mr. Rauch, on an hourly basis, nor reimburse us for any of the [sic] our out-of-pocket costs incurred in prosecuting this case.” (*Id.* at 6.) Based

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upon "the rate of what counsel presently charge for federal civil rights litigation and what other attorneys with similar skill, reputation and experience charge in the Coeur d'Alene area for similar work[,]" Mr. Wood states that his hourly rate is \$300 per hour.

Plaintiff's counsel also have submitted the declaration of Leander James in support of their fee petition. (*Dec. Of Leander L. James, VI*, Dkt. 221.) Mr. James is an attorney in Coeur d'Alene, Idaho, and specializes in complex civil litigation, including civil rights litigation. He has been a member of the Idaho Bar since 1993. He states that his "hourly fee schedule for plaintiff's litigation and trial work ranges from a minimum of \$200/hr. to a maximum of \$325/hr." (*Id.* at ¶ 5.) Mr. James indicates that his rate is based upon a number of factors, including the complexity of the case. (*Id.*) He states that, "[b]ased on my personal knowledge of the experience, expertise, and abilities of Mr. Wood and of prevailing and customary hourly fee rates in the Coeur d'Alene area for attorneys sharing similar experience, reputation, and expertise, in complex and difficult cases of this kind, it is my opinion that an hourly rate of \$300.00 per hour at the present time is warranted under the circumstances and well within the range of customary rates of attorneys in this area." (*Id.* at ¶ 10.) Mr. James indicates that "the long delays in receiving compensation, and the inability of the plaintiffs to pay for costs, all make a substantial hourly fee appropriate." (*Id.* at ¶ 13.) Mr. James also opines that \$250 per hour is a reasonable hourly rate for Mr. Rauch.

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In opposition to Plaintiff's motion for fees, and contrary to the declarations of Messrs. Wood, Rauch, and James, Defendant Blair contends that the case was not particularly complex, stating that the "case involved a 1-2 second 'scuffle' and raised the question of whether excessive force was used when Mr. Mays sustained a small laceration and a black eye." (*Def. Blair's Obj. to Pl.'s Att'y Fees* at 5, Dkt. 226.) Defendant contends that the only complications in this case were of Plaintiff's counsel's own making, stating that "[t]his case was not complex until the Plaintiff and/or his counsel tried to 'stretch' this case by adding a 'second' incident and claimed injuries which were not identified in the medical records." (*Id.*) (emphasis in original). Defendant's point is well taken and, as discussed more fully below, the Court will recommend that the hours spent on aspects of the case unrelated to the "first incident" not be included in the award of fees.

However, the Court does not fully agree with Defendant Blair's contention that this case involved no complexities. Contrary to Defendant Blair's characterization, the first incident did not involve a "garden variety" case of excessive force where officers are acting in their law enforcement capacity. Indeed, this case involved a somewhat murky situation in which the officers were acting pursuant to their community care-taking function. Moreover, the first incident involved multiple law enforcement officers from two different agencies and, due to the nature of the incident, Plaintiff was unable to identify which officer did what to him while he was on the ground. This scenario required

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discovery outside the realm of what can be considered a garden variety excessive force case and warrants consideration in determining a reasonable fee award in this case.

Based on the above, the undersigned finds that Mr. Wood's hourly rate of \$300 per hour is reasonable and will use that rate in determining the lodestar figure. However, based upon Mr. Rauch's experience and the materials filed in support of and in opposition to Plaintiff's motion for fees, the Court finds that Mr. Rauch's hourly rate should not exceed \$175 per hour. This finding is based upon Mr. Rauch's limited experience (having only 4-5 years experience and little or no experience with the type of case at bar), his role in the litigation as second chair, Mr. Rauch's own customary hourly rate, and the prevailing rate in the community. The Court finds Mr. James' declaration particularly instructive on this issue, in which Mr. James indicates that his minimum rate in such cases is \$200 per hour. Mr. James has been practicing over 20 years longer than Mr. Rauch and has substantial experience in this type of case. Mr. Rauch's claimed rate of \$250 per hour is unreasonably high and the Court will base the lodestar figure for Mr. Rauch based upon an hourly rate of \$175 per hour.

B. *Hours Reasonably Expended*

Under § 1988, prevailing parties may only be compensated for those hours of work that were "reasonably expended." *See Hensley*, 461 U.S. at 433-34. The moving party bears the burden of establishing the hours claimed and must carry that burden by submitting adequate documentation of those hours. *Id.* at 437. The Court will not grant a

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fee award for "hours that are excessive, redundant, or otherwise unnecessary." *Id.* at 433-34. It is well settled that a "plaintiff is entitled to recover attorney's fees even for claims on which she did not prevail, if they 'involve a common core of facts or are based on related legal theories.'" *Mendez*, 540 F.3d at 1125-26. Conversely, a plaintiff is not entitled to an award of fees for unsuccessful claims that were "unrelated to" the successful claims. *Hensley*, 461 U.S. at 434.

Mr. Wood states in his declaration that he "necessarily and reasonably devoted 964 hours of work to the prosecution of this case." (Dkt. 219 at 5.) Plaintiff, however, is not seeking reimbursement for time spent exclusively on the "second incident." Mr. Wood represents that he spent 144.2 hours exclusively on the second incident and therefore only seeks compensation for 819.8 hours. (*Id.*) Mr. Rauch represents that he spent 750.4 hours on the case and 38.1 hours exclusively on the second incident. Thus, Mr. Rauch seeks compensation for 712.3 hours of work.

Defendant Blair objects to the number of hours claimed by Plaintiff's attorneys on several grounds. Each will be addressed below.

(1) *Time Spent on Second Incident*

Plaintiff's counsel do not seek compensation for hours spent on the second incident. Defendant Blair contends, however, that Plaintiff's counsel have not excluded all of the hours spent on the second incident and seeks a reduction of 207.2 hours. In support of this argument, Defendant Blair has submitted two exhibits highlighting the

hours spent on the second incident by attorneys Wood and Rauch that Defendant contends should have been excluded. (*Time Attributable to Second Incident (Wood)*, Exhibit A, Dkt. 226-1 pp. 1-7; *Time Attributable to Second Incident (Rauch)*, Dkt. 226-1 pp. 8-11.)

Having carefully reviewed Plaintiff's counsel's billing records, the Court finds that a reduction of 207.2 hours of time spent on the second incident is warranted.⁵ Defendant Blair has supplied the Court with a copy of Plaintiff's counsel's billing records, highlighting the hours spent on the second incident by Messrs. Wood and Rauch, and the Court will not go through the individual billing entries again here. However, the Court will recommend that Mr. Wood's hours be reduced by 186 hours and Mr. Rauch's hours be reduced by 21.2 hours.

(2) *Time Spent on Third Incident*

Like the hours claimed for the second incident, Defendant Blair argues that Plaintiff's counsel should not be compensated for hours spent working on the third incident.

As indicated above, Plaintiff sought leave to amend his complaint to include claims concerning a third incident in which Sergeant Piche of the Lewiston Police

⁵ This includes time for work relating to neurological damages. Plaintiff's attorneys have argued that the time spent on assessing Plaintiff's neurological damages cannot be allocated exclusively to either the first or second incidents because Plaintiff sustained head injuries during both incidents. At trial, however, Plaintiff's expert did not opine that Plaintiff sustained any neurological damages as a result of the first incident. The Court will recommend that the time spent on this issue be excluded.

Department allegedly harassed Mr. Mays. (*Second Mot. To Amend Complaint*, Dkt. 44.)

Other than the fact that the third incident involved an officer from the Lewiston Police Department, the incident had no bearing on Plaintiff's claims concerning the first incident. Ultimately, Plaintiff withdrew his attempt to add a claim related to the third incident. (*Decl. of Jason Wood re: Mot. to Amend*, Dkt. 67.)

Defendant Blair has submitted an exhibit outlining the hours spent by Plaintiff's counsel on the third incident, which Defendant seeks to exclude. (*Time Attributable to Third Incident, Exhibit B*, Dkt. 226-1 pp. 12-13.) The exhibit shows that Mr. Wood spent 22.7 hours on the third incident and Mr. Rauch spent 2.3 hours on third incident. The Court agrees that the third incident was not factually or legally related to Plaintiff's successful claims and the hours spent on the incident should not be included in Plaintiff's award of attorney's fees. Mr. Wood's time will be reduced by an additional 22.7 hours and Mr. Rauch's time will be reduced by an additional 2.3 hours.

(3) Claim Against Defendant Joedy Mundell

Early in the litigation, the parties stipulated to the dismissal of Officer Joedy Mundell, who was named as a defendant in Plaintiff's initial complaint. The stipulation states that each party is to bear his or her own attorney's fees and costs concerning the dismissed claim. (*Stip. For Dismissal of Officer Joedy Mundell*, Dkt. 38.) Defendant Blair has pointed out that Mr. Wood billed 1.1 hours related to the claim against Officer Mundell and Mr. Rauch billed .2 hours related to the claim against Officer Mundell.

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Based upon the stipulation of the parties, the Court will recommend that these hours be subtracted from Plaintiff's claim for attorney's fees.

(4) *Time Spent Communicating and Responding to Discovery and Information from Nez Perce County*

Defendant Blair argues that the time spent on communications and responses to Nez Perce County's pleadings, motions, briefs and interaction with the County's attorney should be excluded from Plaintiff's award of attorney's fees. Defendant Blair seeks the exclusion of these hours based on the ground that the jury did not make any finding against the County or any of its deputies, and the Plaintiff did not prevail on those claims. The Court disagrees.

It is undisputed that Deputy Jose Rodriguez and Sgt. John Hilderbrand of the Nez Perce County Sheriff's Department were involved in the first incident and that Plaintiff brought suit against the officers and the County based on that involvement. Notwithstanding the fact that Plaintiff did not prevail against the County or officers Rodriguez or Hilderbrand, Plaintiff is entitled to attorney's fees for the hours spent on the claims against the County and its officers related to the first incident. *Mendez*, 540 F.3d at 1126 ("A plaintiff is entitled to recover attorney's fees even for claims on which she did not prevail, if they involve a common core of facts or are based on related legal theories.") Plaintiff's counsel have represented that they excluded the hours exclusively spent on the second incident and the Court has excluded additional hours pointed out by Defendant Blair that remained in Plaintiff's counsel's billing directly attributable to the

second incident.

(5) *Reduction for Duplicative and Excessive Hours*

Defendant Blair argues that some of the hours claimed by Plaintiff's attorneys are either duplicative or excessive. Specifically, Defendant points out that Mr. Wood and Mr. Rauch both claimed time for attending the depositions of the same witnesses. Defendant also argues that the following claimed hours are excessive: 36 hours spent by Mr. Rauch preparing the initial complaint; 24 hours spent by Mr. Rauch working on closing argument; and 24 hours spent preparing for closing argument by Mr. Wood.

Plaintiff agrees that he should not receive an award of fees for time Mr. Rauch spent on depositions that Mr. Wood also attended. Similarly, Plaintiff does not object to reducing Mr. Rauch's time for the initial complaint to 10 hours. However, Plaintiff does take issue with Defendant Blair's argument that the time spent on closing arguments was excessive. On this issue, the Court will defer to Plaintiff's counsel's judgment. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case . . .").

Based on the above, and having reviewed Defendant Blair's exhibits highlighting the hours he claims are excessive or duplicative, (Dkt. 226-2 pp. 7-8), the Court agrees that 38.1 hours should be excluded from Mr. Rauch's time. The Court, however, does not

agree that 18 hours should be excluded from Mr. Wood's time.⁶

(6) *Mr. Wood's Travel Time*

The facts giving rise to this litigation occurred in North Idaho. After unsuccessfully seeking local lead counsel to help him with the case, Mr. Rauch accepted the assistance of Mr. Wood, who lives in Southeastern Idaho. It appears that Mr. Wood made approximately eight trips from Idaho Falls, Idaho, to North Idaho in preparation for this case. Mr. Wood drove on all but one of these trips—each taking approximately eight hours. Defendant Blair objects to these hours, arguing that it was unnecessary for Mr. Wood to travel to North Idaho because co-counsel already was located there. Defendant Blair also argues that Mr. Wood's driving time is excessive—pointing out that Mr. Wood flew to Lewiston on one occasion and that it only took five hours as opposed to eight.

The Court disagrees with Defendant Blair's suggestion that Mr. Wood's time in North Idaho should be entirely excluded because co-counsel was already located there. The Court has recognized that Mr. Rauch was inexperienced in this matter and adjusted his hourly rate accordingly. The fact that Mr. Wood traveled to North Idaho to prepare for this case is not in itself unreasonable. However, the Court does agree that the driving time is excessive and each trip to and from North Idaho will be reduced to five hours, which is the time it took Mr. Wood to fly to Lewiston. Thus, having reviewed Defendant Blair's

⁶ Defendant Blair also states that 2.8 hours claimed by Mr. Wood appear to be clerical errors and that 4.5 hours claimed by Mr. Rauch appear to be clerical errors. The Court agrees, and these hours will be excluded.

exhibit highlighting Mr. Wood's travel time, (Dkt. 226-2 at 9), the Court will subtract 35 hours attributable to Mr. Wood's travel time.

(7) Time Spent on Criminal Prosecution

Mr. Rauch seeks compensation for 67.6 hours spent working on Mr. Mays' criminal prosecution for resisting arrest. Plaintiff argues that "[i]t was necessary for Mays to obtain a dismissal of the criminal charges of resisting arrest; otherwise his section 1983 claim would have been barred." (*Reply to Def. Blair's Obj. To Pl.'s Att'y Fees* at 16, Dkt. 235.) While this may be true, the Ninth Circuit has indicated that these hours may not be claimed under § 1988. *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1989) (explaining that attorney's fees for time spent in defending criminal charge prior to bringing an action under § 1983 may be claimed as *damages* in the civil rights suit, but that they may not be claimed as attorney's fees under § 1988). Based on *Borunda*, the time Mr. Rauch spent on Plaintiff's criminal charge (67.6 hours) will be excluded.

(8) Time Spent on Claims of On-Going Harassment

Plaintiff's counsel have submitted entries seeking compensation for time spent pertaining to Plaintiff's allegations that he was being harassed continually by the Lewiston police. Defendant Blair seeks the exclusion of this time as it was unrelated to the claims on which Plaintiff prevailed. The Court agrees and will exclude 1.7 hours from Mr. Rauch's compensable time and 1.3 hours from Mr. Wood's compensable time.

(9) *Hours Claimed by Mr. Magyar and Mr. Thie*

Plaintiff seeks attorney's fees for work done by Mr. Rauch's partners Robert Magyar and Brian Thie. Mr. Magyar claims a total of 34.6 hours at \$200 per hour and Mr. Thie claims 13.7 hours at \$200 per hour. Defendant Blair objects to an award of attorney's fees for both of Mr. Rauch's partners for several reasons. As explained below, the undersigned will recommend that both attorneys' hours be reduced.

Concerning Mr. Magyar, 23.4 of the 34.6 hours claimed relate to Mr. Mays' criminal proceedings. As discussed above, those hours are not compensable for the purposes of 42 U.S.C. § 1988. The remaining 11.2 hours appear to relate to Plaintiff's claims in this action. However, while Mr. Rauch's declaration states that Plaintiff is seeking \$200 per hour for Mr. Magyar's work, the billing entries attached to Mr. Rauch's declaration show that Mr. Magyar billed at a rate of \$150 per hour. The undersigned will recommend that Plaintiff be awarded attorney's fees for 11.2 hours of Mr. Magyar's work at \$150 per hour.

With respect to Mr. Thie, Defendant Blair objects to three entries that appear to be clerical errors. For instance, Mr. Thie claims 1.5 hours of work on June 24, 2011. This case, however, was completed on June 23, 2011, and Defendant argues that this time should be excluded. The Court agrees. Similarly, Mr. Thie claims 3 hours of work on May 20, 2011, for work done reviewing and editing a motion for summary judgment. The deadline for summary judgment briefing, however, had expired in April of 2011 and

Plaintiff filed his reply to Defendants' motion for summary judgment on April 30, 2011. It will be recommended that these hours be excluded. Finally, Mr. Thie's billing sheet contains an entry for research on *res ipsa loquitar* [sic] and "joint liability theories." (Dkt. 220 at 36.) This entry appears to be related to another case and the 2.5 hours claimed for the work will be excluded. Thus, the undersigned will recommend that 8 of the 13.7 hours claimed by Mr. Thie be excluded and that Mr. Thie's time be compensated at \$150 per hour—the same rate as Mr. Magyar.

(C) Results Obtained

In *Hensley v. Eckerhart*, 461 U.S. 242 (1983), the Supreme Court held that if the party seeking attorney's fees has not succeeded on all claims, the district court should award only an amount that is reasonable in relation to the results of the suit. If the results are excellent despite the less than complete success, the fee movant should obtain a fully compensatory fee, including compensation for hours devoted to the claims that were ultimately unsuccessful. *Id.* at 434. In the absence of "excellent" results, however, a fully compensatory fee may be excessive, and the district court should reduce the lodestar figure to account for the limited success. *Id.* There is no rule or formula for making a reduction; rather, it is within the discretion of the district court to determine a reasonable fee. *Id.* at 436-37 ("There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has

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discretion in making this equitable judgment.”)

Defendant Blair argues that Plaintiff’s award of attorney’s fees should be significantly reduced given his limited success. Defendant Blair “submits that this Court would be justified in awarding the Plaintiff 10 - 15 % or less of the amount of attorney fee claimed once the appropriate number of hours are identified.” (*Def. Blair’s Obj. To Pl.’s Att’y Fees* at 9) (emphasis in original). The undersigned agrees that Plaintiff’s award of attorney’s fees should be adjusted to account for Plaintiff’s limited success, but not to the extent sought by Defendant Blair.

In his initial complaint, Plaintiff brought suit against four police officers employed by the City of Lewiston and three deputies employed by Nez Perce County Sheriff’s Department. Plaintiff also sought relief against the City and the County. All of the claims in the initial complaint related to the first incident. Plaintiff’s initial complaint sought \$1.5 million in compensatory, punitive, incidental, and consequential damages. Plaintiff later amended his complaint, however, and did not seek any specific amount.

The case proceeded to trial against five officers involved in the first incident. During closing arguments, Plaintiff’s counsel suggested that Mr. Mays’ general damages may be worth \$200,000 to \$300,000. The jury found that only Officer Blair had used excessive force and the jury awarded Plaintiff \$1,954.27 in compensatory damages for medical expenses.

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Defendant Blair suggests that an 85 - 90% reduction is appropriate in this case. In support of this contention, Defendant Blair points out that Plaintiff only succeeded against one of eight defendants, which is a 12.5% success rate. Defendant Blair also points out that the initial figure of \$1.5 million requested in comparison with the \$1,956.27 recovered is 0.13%. The Court finds that the results obtained in this case cannot be considered "excellent" and that a fully compensatory fee would be excessive in this case under *Hensley*. The question is how much the award should be reduced to account for Plaintiff's limited success.

The Court does not agree that Plaintiff's award should be reduced by 85 - 90%. The verdict against Defendant Blair finding that he had used excessive force during the welfare check conferred a benefit on the public and possesses some value. As the Ninth Circuit found in *Morales v. City of San Rafael*, the litigation in this case served the significant public policy interest "of helping to protect [Plaintiff] and persons like him from being subjected to similar unlawful treatment in the future" and the verdict "constitutes a warning to law-enforcement officers not to treat civilians unconstitutionally." 96 F.3d at 364-65.

The Court finds that the percentages provided by Defendant Blair are a useful starting point. Plaintiff succeeded against one of eight defendants equaling 12.5% and on one claim out of six equaling 16.66%. Using these figures as a starting point and giving Plaintiff a bump in fees in recognition of the public benefit conferred by the verdict in this

REPORT AND RECOMMENDATION - 25

case, the Court will recommend that the lodestar calculation include a 75% reduction to account for Plaintiff's limited success.

Taking into consideration the reductions outlined above and the reduction for limited success, the Court will recommend a lodestar calculation as follows:

Jason Wood

964 total hours claimed
- 186 (Second Incident)
- 22.7 (Third Incident)
- 1.1 (claim against Mundell)
- 2.8 (clerical errors)
- 35 (excessive travel time)
- 1.3 (on going harassment)

715.1 Revised total hours

715.1 x \$300 per hour = \$214,530.00 x 0.25 for limited success adjustment
= \$53,632.50

Gregory Rauch

750.40 total hours claimed
- 21.2 (Second Incident)
- 2.3 (Third Incident)
- 0.2 (claim against Mundell)
- 38.1 (duplicative or excessive hours)
- 4.5 (clerical errors)
- 67.6 (criminal case)
- 1.7 (on going harassment)
- 34.6 (Mr. Magyar's hours)
- 13.7 (Mr. Thie's hours)

566.5 Revised total hours⁷

566.5 x \$175 per hour = \$99,137.50 x 0.25 for limited success adjustment

= \$24,784.40

Robert Magyar

34.6 total hours claimed

- 23.4 (criminal case)

11.2 Revised total hours

11.2 x \$150 per hour = \$1,680.00 x 0.25 for limited success adjustment

= \$420

Brian Thie

13.7 total hours claimed

- 7 (clerical errors)

6.7 Revised total hours

6.7 x \$150 per hour = \$1,005.00 x 0.25 for limited success adjustment

= \$251.25

\$79,088.15 Total Lodestar Figure

\$79,088.15 + \$5,703.26 (adjusted costs)⁸ = \$84,791.41 (total recommend attorney's

⁷ Because the Court has determined that Messrs. Magyar and Thie are entitled to an hourly rate different from that of Mr. Rauch, the Court has completely deducted their hours from Mr. Rauch's lodestar calculation and reassesses them according to their own rate below.

⁸ This figure represents adjusted costs recoverable under § 1988 but not taxable as costs under Local Rule 54.1. Defendant Blair objected to Mr. Rauch claiming service costs, which are provided for under the Federal Rules. The Court agrees that this item

fee award)

RECOMMENDATION

NOW THEREFORE IT IS HEREBY RECOMMENDED that:

Plaintiff's Petition for Award of Attorney Fees (Dkt. 218) be **GRANTED IN PART** and that Plaintiff be awarded **\$84,791.41** in attorney's fees and costs under 42 U.S.C. § 1988.

Written objections to this Report and Recommendation must be filed within fourteen (14) days pursuant to 28 U.S.C. § 636(b)(1) and Dist. Idaho L. Rule 72.1(b), or as a result of failing to do so, that party may waive the right to raise factual and/or legal objections to the United States Court of Appeals for the Ninth Circuit.



DATED: February 14, 2012

Honorable Candy W. Dale
Chief United States Magistrate Judge

should not have been included and has subtracted \$300 from Plaintiff's costs. The undersigned has reviewed the remainder of Plaintiff's non-taxable costs and finds them compensable.

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

KEVIN E. MAYS,	)	Case No. CV08-552-C-EJL-CWD
)	
Plaintiff,)	
)	
v.	)	DECLARATION OF T. JASON WOOD
	)	IN SUPPORT OF MOTION FOR AWARD
TODD STOBIE, et al.,	)	OF ATTORNEY FEES AND COSTS
)	
Defendants.)	
)	

I, T. Jason Wood, declare under penalty of perjury, as follows:

1. I am a member of Thomsen Stephens Law Offices, PLLC, attorneys for Plaintiff in this matter and I make this affidavit from personal knowledge.

2. I have been a member of the Idaho State Bar since September 1994. I am also admitted to practice before the United States District Court for the District of Idaho, and the United States Court of Appeals for the Ninth Circuit.

3. I was a law clerk to United States Magistrate Judge Larry M. Boyle from May 1994 through July 1995, where I assisted Judge Boyle in numerous civil rights cases.

4. Since 1995 I have practiced in the law firm of Thomsen Stephens Law Offices, PLLC, in Idaho Falls, Idaho., an eight-member firm. I have been a shareholder in the firm since 2001.

5. I was on the Regional Board of Directors for the Idaho Trial Lawyer's Association from 2005-2010.. I served on its Executive Committee as ITLA's Secretary 2010-2011, and I am currently its Treasurer.

6. Initially my practice was wide-ranging, including civil and criminal defense, family law, and civil plaintiff's work. Since 2001, my practice narrowed to focus primarily on representing plaintiffs throughout the State of Idaho, including civil rights cases involving excessive use of force by police officers. I have tried several cases to judgment, and have briefed and argued several cases before the Idaho Court of Appeals, Idaho Supreme Court, and Ninth Circuit Court of Appeals, two of them civil rights cases.¹

7. I first became involved in this case as counsel for Plaintiff Kevin Mays in December 2008 at the request of my co-counsel, Gregory Rauch, who sought someone with expertise in civil rights litigation. I officially became lead counsel of record on February 3, 2009. (See Doc. 3).

¹Including: *Bromley v. Garey*, 132 Idaho 807, 879 P.2d 1165 (1999); *Hindmarsh v. Mock*, 2001 Ida. App. LEXIS 113 (May 17, 2001); *Clark v. Raty*, 137 Idaho 343, 48 P.3d 672 (2002); *Kagel v. U.S. Army Corps of Eng'rs*, 2000 U.S. App. LEXIS 8511, No. 98-35697 (9th Cir.) (*civil rights*); *Dickson v. Scoville*, 2000 U.S. App. LEXIS 8511, No. 98-36062 (9th Cir.); *Decoria v. County of Jefferson*, 2009 U.S. App. LEXIS 10788, No. 07-36066 (*civil rights*).

8. I decided to take this case knowing few, if any, attorneys would be willing to undertake such representation because of the difficulties inherent in Plaintiff's case, because of Idaho juries' reluctance to find against law enforcement officers, particularly where plaintiffs have a criminal history and extensive damages are not clear. In undertaking representation of Plaintiff, despite the aforementioned difficulties, I also knew that if I did not prevail I would not be compensated for my efforts nor reimbursed for my out-of-pocket costs advanced during the course of the litigation.

9. Upon carefully reviewing the evidence of Plaintiff's mental condition following both the First Incident (December 23, 2006) and the Second incident (November 17, 2009), I determined the complaint should be amended to add the Second Incident. The primary reason for joining the Second Incident with the First Incident was that Plaintiff sustained head injuries in both incidents, and the evidence suggested neuro-cognitive injury that could have been caused by either or both incidents. The risk was that the defendants responsible for the First Incident would point the finger at the defendants responsible for the Second Incident for causing Plaintiff's brain damage, and vice versa. Had the claims not been joined, the result thereby could have been that *both* sets of defendants would either be held responsible for Plaintiff's brain damage, or *neither* of them, simply by blaming the other. (*See* Docs. 20-3; 24 at 4-5).

10. The defendants did in fact follow this tactic, suggesting throughout these proceedings the cumulative effects of trauma to Plaintiff's head, other than the incidents alleged in the complaint, may have caused or contributed to Plaintiff's current mental and visual problems. (*See, e.g.*, Docs. 107-1; 115-15). Therefore I was, and remain, of the opinion that in order to prosecute Plaintiff's claim based on the First Incident it was necessary to pursue the Second Incident in the same case.

11. Nevertheless, I kept detailed records of the time I spent in this case exclusively on the Second Incident to the extent possible. The amount of time spend exclusively on the Second Incident was 144.2 hours. These hours appear underlined in my attached billing records.

12. The time I spent devoted to this case was significant due not only to the factual, legal, and evidentiary complexity of the case, but because of the large number of witnesses identified in discovery as witnesses with knowledge (over 75), the number of expert witnesses offering opinions on diverse and complex issues (13), the number of depositions taken (22), the thousands of pages of documents produced and generated in discovery and in litigation in this case, the time required for the several trips I was required to take from Idaho Falls to Lewiston, Moscow, and Coeur d'Alene for this case, and the necessity of being prepared to go to trial on all issues and evidence until the Court issued its 06/01/11 decision on the defendants' motions for summary judgment. (Doc. 162).

13. The hours listed are based upon contemporaneous records which I personally kept as I did the work. All of the hours listed were reasonable and necessary to the prosecution of this case. I have exercised billing judgment and excluded many hours.

14. Mr. Rauch acted as co-counsel in th is matter. He played a supportive but crucial role throughout this case, especially during summary judgment proceedings and the 6-day trial of this matter, examining almost half the witnesses in our case, cross-examining almost half the defense witnesses. I reviewed and edited documents he prepared and filed with the Court, but his work was not duplicative of my own. Although I took most of the depositions on behalf of Plaintiff in this case, we otherwise divided most of the work. For example, Mr. Rauch was primarily responsible for briefing in opposition to the defendants' motions for summary judgment regarding the First Incident, while I was responsible for all the briefing and work regarding the Second Incident.

Because of the tremendous amount of time and money Plaintiffs' counsel must personally invest in a case like this, with the possibility of payment contingent on the final outcome in the distant, Mr. Rauch and I had every motivation to, and in fact did, use our best efforts not to duplicate our efforts or waste our precious resources on issues or time we believed would not benefit the case.

15. The hourly rate claimed for my time submitted with this Affidavit is \$300 per hour. This hourly rate is based upon the rate of what counsel presently charge for federal civil rights litigation and what other attorneys with similar skill, reputation and experience charge in the Coeur d'Alene area for similar work. It also reflects the rates in similar cases charged by attorneys with similar skill, reputation and experience in the federal District of Idaho. *See* Affidavits of Walt Sinclair and Kurt Hozler attached to the Memorandum filed in support of Plaintiff's petition for attorney fees. *See also LaPeter v. Canada Life Ins. Co.*, Case No. CV-06-121-S-BLW, 2009 U.S. Dist. LEXIS 40263, **7-9 (D. Idaho, May 11, 2009); *Suter v. National Rehab Partners, Inc.*, Case No. CV03-15-S-BLW (2007 U.S. Dist. LEXIS 70952, **9-10 (D. Idaho, Sept. 24, 2007).

16. An itemization of my attorney time, expended in this action is attached to this Declaration as Exhibit 1. I have necessarily and reasonably devoted 964 hours of work to the prosecution of this case, both the First and Second Incidents, at the hourly rate of \$300/hr. As previously indicated, damage issues regarding injuries to Plaintiff's brain and left eye in both incidents were clearly intertwined, and therefore it was necessary to join the Second Incident with the First. Nevertheless, Plaintiff is not seeking reimbursement for time spent exclusively on the Second incident. The total hours spent exclusively on the Second incident was 144.2 hours. Plaintiff seeks reimbursement for time necessarily and reasonably spent on the First Incident only, which for me was 819.8 hours, and for Mr. Rauch was 712.30.

17. From the beginning of our representation of Kevin Mays, he has been unable to pay me or co-counsel, Mr. Rauch, on an hourly basis, nor reimburse us for any of the our out-of-pocket costs incurred in prosecuting this case.

18. Virtually all the time I devoted to prosecuting Plaintiff's claims against all other defendants than Donald Blair, pertaining to the First Incident set forth in the Amended Complaint, were necessary for, and directly benefitted, Plaintiff's claims against Donald Blair. Donald Blair was the supervising law enforcement officer on the scene, the most experienced, and he was the officer most involved in the excessive use of force against Plaintiff on December 23, 2006. Plaintiff was face down on the ground when the officers struck him and, consequently, he could not identify who used what force against him. Throughout this litigation the defendants, including Blair, contended that they did not strike Plaintiff with a blunt object, and that Plaintiff had failed to identify any specific action by the any of the individual defendants that caused his injuries. (*See, e.g.*, Docs. 107-1 at 10; 124 at 3-7). They also contended at trial that Plaintiff was intoxicated and therefore could not recall what happened to him. Therefore it was absolutely necessary to Plaintiff's claims against Blair to conduct all the discovery Plaintiff's counsel conducted in this case regarding all witnesses to the incident, any investigations pertaining thereto, damages, and to obtain expert opinions from David Neal regarding use of force and damages. Likewise, because Plaintiff could not identify which officer did what to him, he was required to name all officers in close proximity and defend motions for summary judgment by such officers. (*See* Doc. 116 at 24-28). Furthermore, the trial testimony of each of the individual defendants other than Blair were *crucial* to obtaining the judgment against defendant Blair. It is simply impossible to separately identify time devoted solely to claims against defendant Blair for the claims made against the other defendants which were

unsuccessful, since such claims arose from a common nucleus of operative facts as the claims against the other defendants originally named in the First Incident, and such claims were inextricably intertwined with one another.

19. Plaintiff also seeks \$4,268.80 in costs that could not be included in Plaintiff's Bill of Costs, but which I have incurred and normally would be required to pay, in addition to the attorney fees, including travel expenses such a mileage, rental cars, meals, and lodging, as set forth in the underlined, italicized and bolded entries on the last 3 pages of the Exhibit 1 attached hereto, and which are therefore awardable as a component of attorney fees under 42 U.S.C. § 1988.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States to the best of my knowledge and belief.

Dated this 14th day of July, 2011.

/s/

T. Jason Wood

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 14, 2011, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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THOMSEN STEPHENS LAW OFFICES, PLLC

By: /s/
T. Jason Wood
Attorney for Plaintiff

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

KEVIN E. MAYS,

Plaintiff,

v.

TODD STOBIE, et al.,

Defendants.

Case No. CV08-552-C-EJL-CWD

DECLARATION OF
 LEANDER L. JAMES, VI

I, Leander L. James, IV, declare under penalty of perjury, as follows:

1. I am a shareholder in and a founding member of the firm of James, Vernon & Weeks, P.A., in Coeur d'Alene, Idaho. I have been actively practicing law since 1993. I am fifty-one years old. I was admitted to the Idaho State Bar on September 23, 1993. I was admitted to the Washington Bar on November 10, 1994. I am also admitted to practice before the United States

District Courts for the District of Idaho, Eastern and Western Districts of Washington, and the Eastern District of Wisconsin. I am rated BV with Martindale-Hubbell. I am a Past-President of the Idaho Trial Lawyers Association (ITLA), and I am currently an Amicus Committee Chair for that organization. I am an appointed board member of the Idaho State Bar Professional Conduct Board. Thus, I often interact with other members of the Bar on issues of legal professionalism.

2. I specialize in complex civil litigation and trial work, including catastrophic injury cases, employment law, civil rights litigation like the instant case, multi-district litigation, and commercial litigation, both for plaintiffs and defendants, but a majority on behalf of plaintiffs. About 75% of my cases have been for contingent fees approximately 25% have been hourly. I have been involved in many sophisticated litigation and trial battles and have tried numerous cases to verdict. Most of my trials have lasted at least 5 days.

3. I have presented at seminars on behalf the Idaho Bar Association, Kootenai County Bar Association, the Idaho Trial Lawyers Association and the Western Trial Lawyers Association on subjects of civil litigation and trial advocacy. I have published, at the request of editors, in the Idaho State Bar journal *Advocate* and the *Idaho Trial Lawyers Association Journal* on issues of civil litigation and insurance law. I have testified, at the request of legislators and public interest groups, before the Idaho State Legislature regarding issues of civil litigation and insurance. I have presented two cases before the Idaho Supreme Court and one case before the Idaho Court of Appeals, including the cases of *Johnson v. Sanchez*, 140 Idaho 667 (Ct. App. 2005) and *Akers v. D.L. White et. al*, Docket Nos. 30795 and 30845.

4. The majority of the civil litigator's work is done out of court, e.g. through investigation, written discovery, depositions, legal research, briefing, motion practice, mediations and arbitrations. But when the case goes to trial, the work increases exponentially. In the past five years I have litigated over

ninety-five civil cases, many involving complex litigation and personal injury. I have litigated most of these cases through written discovery and depositions. In this time frame I have litigated approximately twenty civil cases through discovery and trial preparation (i.e. the case settled shortly before or during trial). I have tried at least sixteen civil cases to jury verdicts as the Plaintiff's attorney, including insurance and complex-civil cases, such as medical malpractice cases. At least five of my trials have lasted more than seven working days. Four of these trials lasted fourteen working days or more. One of these cases was a two-week, complex, civil litigation action in Anoka County, Minnesota. Also, I have mediated and arbitrated a number of personal injury cases as both the Plaintiff's attorney and as the mediator and arbitrator.

5. My hourly fee schedule for plaintiff's litigation and trial work ranges from a minimum of \$200/hr. to a maximum of \$325/hr. The complexities and nature of the litigation drive the decision-making on the appropriate hourly rate. My partners, Craig Vernon and Susan Weeks, charge similar amounts as their ordinary hourly rates in such representation.

6. I am personally familiar with the billing practices of a number of law firms and lawyers throughout the States of Idaho and Washington, particularly northern Idaho and Eastern Washington, including Coeur d'Alene, Idaho and Spokane, Washington. I have developed this knowledge in a number of ways including my previous work litigating with other attorneys and firms, informal conversations with professional colleagues, presentations during professional development conferences, and on a number of occasions, having other attorneys prepare affidavits regarding their fee practices.

7. There are a large number of factors that impact an attorney's hourly rate. The factors include, but are not limited to, the unique knowledge that the attorney can put to work for the client, the relationship with the particular client, the risks presented by the particular litigation, the complexity of

the case and length of the case, the nature of the opposing party, the stream of business a client can provide, the desirability of the case and likelihood of getting paid over how long a period of time.

8. For example, my experience has taught me that large corporate institutions and insurance companies get a "good deal" (i.e. a better price) and can retain lawyers who could otherwise command a much higher fee because they offer a regular stream of business for the lawyer. Such institutions also provide work that the more experienced attorney can have performed by younger, less experienced lawyers. Often the "originating attorney" in such situations gives this work to the least experienced lawyer, financially benefitting the "originating attorney," thus effectively increasing his or her net hourly income. My firm does not compensate for such "origination."

9. I am familiar with Jason Wood through the Idaho Trial Lawyers Association (ITLA), and by professional reputation. He served on the Regional Board of Directors Regional Board of Directors for the ITLA Idaho Trial Lawyer's Association from 2005-2010, while I was on the Board of Directors, Executive Committee, and as its president. His reputation in the legal community is as one of the most knowledgeable and capable attorneys in Idaho regarding Civil Rights litigation. I have reviewed his declaration and the declaration of his co-counsel, Mr. Gregory Rauch, filed in support of their motion for attorney fees in the above matter.

10. Based on my personal knowledge of the experience, expertise, and abilities of Mr. Wood and of prevailing and customary hourly fee rates in the Coeur d'Alene area for attorneys sharing similar experience, reputation, and expertise, in complex and difficult cases of this kind, it is my opinion that an hourly rate of \$300.00 per hour at the present time is warranted under the circumstances and well within the range of customary rates of attorneys in this area. I am familiar with a number of attorneys who would charge a higher hourly fee for complex and difficult plaintiff's civil litigation. This is particularly

true in litigating against governmental entities and employees, given their ability to "throw" essentially unlimited resources at the litigation. I charge \$250-325/hr for such cases.

11. My professional opinion based on my experience, background and education is that \$300.00 per hour in Coeur d'Alene, Idaho, would be a reasonable rate if an attorney were to get paid regularly as the case proceeded to resolution. Many attorneys who regularly work on a contingency fee basis would not even begin the work on a case of this complexity against governmental defendants unless they had a realistic expectation that they had a substantial possibility they would ultimately recover four to five times the \$300.00 hourly rate. I do know that there are a number of lawyers in Idaho, particularly counsel with comparable years of practice as Mr. Wood now charging \$300.00 to \$400.00 an hour for complex civil litigation.

12. I can state without hesitation that most attorneys in private practice would refuse to undertake this case in the first place because of the difficulties inherent in such civil rights litigation and attorneys' unfamiliarity with the legal issues and substantive facts. It would undoubtedly be a time and money sink, and even if the plaintiff were fortunate enough to prevail it would be several years before costs would be reimbursed and any compensation would be received for the attorney's efforts. Consequently, citizens in need of legal representation on civil rights issues often can't find an attorney willing to represent them, because the risks of not being adequately compensated are just too great. Having reviewed this case, and in light of the several problems it entails, such as multiple defendant issues, pre-existing condition issues, multiple-incident issues, and difficult damage issues, in addition to the usual difficulties suing police officers and governmental entities, the risks were so great that in my opinion it would be highly unlikely that ANY attorney in this area would have taken this case.

13. Significantly, the inability of the plaintiff to pay any fees, the unique risks associated with ever obtaining a fee award in this type of case, the long delays in receiving compensation, and the inability of the plaintiffs to pay for costs, all make a substantial hourly fee appropriate. The difficulty, even unlikelihood, of Plaintiffs obtaining counsel with the financial ability and long-term commitment to make sure a case like this is properly pursued, cannot be overstated. This is especially true for small firms like Mr. Wood's and Mr. Rauch's, because the attorney has to set aside other clients and cases to devote time to this type of litigation. It not only affects his current practice but also his ability to take on other representation, especially clients who pay their bill on a monthly basis and provide necessary cash flow.


14. The vast majority of my practice is done on a contingency fee basis. Such a practice contains large financial risks. I frequently evaluate new cases from the perspective of whether to accept it on a contingency fee basis. My evaluation of a case like this one would be that the potential success is far off and the risks of failure would be very high. An attorney in Coeur d'Alene who agreed to take a case on a contingency fee basis would normally recover a fee based upon thirty-three (33), forty (40) percent, or forty-five (45) of the total recovery or more and the client would have to pay all of the costs. I believe that a contingency fee lawyer in this area would charge a higher rate for this case and most, if not all, would simply refuse to accept a case like this. On a contingency fee basis, 50% would be my rate for a case like this, if I took the case at all. But I turn down cases like these on a regular basis because of the financial risk.

15. For all these reasons, I am of the firm opinion that \$300.00 per hour is a reasonable rate of compensation at this time for Mr. Wood's work on this case.

16. I have also reviewed the Declaration of Gregory R. Rauch, co-counsel for Plaintiff in this matter, and I concur that \$250 per hour is reasonable and in accordance with prevailing rates of attorneys with similar experience, expertise, and ability.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States to the best of my knowledge and belief.

DATED this 14th day of July, 2011.


Leander L. James

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 14, 2011, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

BRIAN K. JULIAN
(bjulian@ajhlaw.com)
CHRIS H. HANSEN
(chhansen@ajhlaw.com)

SONYALEE R. NUTSCH
(snutsch@clbrmc.com)

GREGORY R. RAUCH
(grauch@magvarlawfirm.com)

THOMSEN STEPHENS LAW OFFICES, PLLC

By: /s/
T. Jason Wood
Attorney for Plaintiff

F:\6936\Pleadings\082 Decl James.wpd

Howard A. Belodoff
 BELODOFF LAW OFFICE
 1004 West Fort St.
 Boise, Idaho 83702
 Tel (208) 331-3378
 Fax (208) 947-0014
 ISB # 2290

Attorney for Plaintiffs-Appellants

IN THE UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

JEFF D., et al.,)	
)	
Plaintiffs-Appellants,	)	Court of Appeals
	)	Docket No. 07-36009
vs.)	
	)	District Court Docket No.
CLEMENT LEROY OTTER, et al.,	)	CV-80-4091
)	
Defendants/Appellees.	)	AFFIDAVIT OF KURT HOLZER
	)	IN SUPPORT OF AWARD OF
	)	ATTORNEY FEES
)	

STATE OF IDAHO)
) ss.
 County of Ada)

KURT HOLZER, being first duly sworn upon oath, deposes and states:

1. That I am an attorney licensed to practice law in the state of Idaho. I was admitted to the State Bar in 1992 and have practiced continuously in the state of Idaho since 1993, after the conclusion of an Appellate Court Clerkship in Utah. I have extensive civil litigation experience in

AFFIDAVIT OF KURT HOLZER IN SUPPORT OF AWARD OF ATTORNEY FEES - Page 1

both federal and state court litigation. I am admitted before all state courts in the state of Idaho and the U.S. District of Idaho. I have appeared many times before Idaho Supreme Court.

2. Starting in 1993, I practiced for seven (7) years with the Boise office of the law firm of Holland & Hart, LLP, a then 220 plus lawyer multi-state law firm based in Denver. I specialized in complex commercial and contingent-fee personal injury litigation. I have been involved in many sophisticated litigation battles and have tried numerous cases to verdict. I have handled a number of appeals as well as cases of original jurisdiction in appellate courts. In October of 2000, my partners and I founded a multi-state firm under the name of Murphy, Holzer, & Vaughan, LLC. In January 2005, we disbanded that firm and I became a shareholder in what is now Holzer Edwards, Chtd. This firm has been in existence for almost twenty years.

3. I have been an active member of the Idaho Trial Lawyers Association Board of Directors since 1997. I served that organization as its President during 2005-06. I am currently serving my third term as a member of the Professional Conduct Board of the Idaho State Bar. For a number of years, I annually presented Idaho Supreme Court reviews to the membership of the 4th District Bar Association. I am also member of the Litigation Section of the Idaho State Bar. Thus, I often interact with other members of the Bar in both case advocacy and professional development settings.

4. My practice focuses primarily on contingent personal injury litigation. I continue to maintain a small portion of my practice in business and consumer litigation. My ordinary hourly rate ranges between \$250 and \$300 per hour for such litigation or for injury litigation where an hourly rate is used. When I am working on an hourly basis, I also require that a client pay a retainer to

insure payment of the fee. The complexities and nature of the litigation drive the decision making on the appropriate hourly rate. My partner, John Edwards, charges similar amounts as his ordinary hourly rate in such representation.

5. At the request of Plaintiffs' counsel, I have refamiliarized myself with the history of this case. I have for many years--well over a decade and closer to two--had knowledge of this litigation based on media reports and informal conversations with other attorneys. In 2002 and then again in early 2007, I undertook an in-depth review of the proceedings by reviewing the docket and filings in depth through that time.

6. In preparing this particular Affidavit, I have reviewed the Opening and Reply Briefs filed in this appeal. One of the notable things that jumps out from that briefing, particularly in the Reply Brief, is the repeated citation to and quotation from the voluminous record in the case. I certainly understand from experience that the effort required to create such a detailed and precise review of a big record involves a huge time investment to ensure its accuracy and usefulness for the reviewing court.

7. I am personally familiar with the billing practices of a number of Boise, Idaho law firms and lawyers. I have developed this knowledge in a number of ways including working within a large firm, informal conversations with professional colleagues, presentations during professional development conferences, and on a number of occasions, having other attorneys prepare affidavits regarding their fee practices.

8. There are a large number of factors that impact an attorney's hourly rate. The factors include, but are not limited to, the unique knowledge that the attorney can put to work for the

client, the relationship with the particular client, the risks presented by the particular litigation, the nature of the opposing party, and the stream of business a client can provide.

9. For example, my experience has taught me that large corporate institutions and insurance companies get a "good deal" (i.e. a better price) and can retain lawyers who could otherwise command a higher fee because they offer a regular stream of business for the lawyer. Such institutions also provide work that the more experienced attorney can have performed by younger, less experienced lawyers.

10. I am familiar with Howard Belodoff primarily by professional reputation. His reputation in the legal community is as one of the (if not the) most knowledgeable attorneys in Idaho regarding Civil Rights litigation. Based on my personal knowledge and review of the materials cited above and given Mr. Belodoff's extensive experience and his role as lead counsel for over thirty one (31) years, it is my opinion that an hourly rate of \$400.00 per hour at the present time is warranted under the circumstances. It is at a minimum similar to, and in some cases less than, what other attorneys of comparable experience level in Boise would charge for the work at issue.

11. I am familiar with a number of attorneys who would charge a higher hourly fee for complex and difficult civil class action litigation and appeals. That is particularly true where such litigation and appeals involves thousands of class members and state officials are the defendants. Structural bureaucratic issues as well as the frictions created by interaction with the political processes and the ability to "throw" essentially unlimited resources at the litigation, often make governmental defendants particularly difficult and at times even unpleasant to litigate against.

12. My professional opinion based on my experience, background and education is that \$400.00 an hour would be a reasonable rate if an attorney were to get paid regularly as the case proceeded to resolution. Many attorneys who regularly work on a contingency fee basis would not even begin the work on a case of this sophistication and magnitude unless they had a realistic expectation that they had a substantial possibility they would ultimately recover three to four times the \$400.00 an hour rate. I do know that there are a number of lawyers in Idaho, particularly senior counsel with comparable years of practice as Mr. Belodoff, now charging \$350.00 to \$450.00 an hour for complex litigation and appellate work.

13. Understanding and presenting issues involving the rights of thousands of mentally ill children, undertaking the efforts to monitor and enforce compliance with the Consent Decrees and Court Orders in this case all involve complex and sophisticated issues that would befuddle most attorneys unfamiliar with the substantive law or the state programs that provide children's mental health services. To successfully battle with often recalcitrant state agencies requires experienced, tenacious, diligent and knowledgeable counsel such as Mr. Belodoff who has worked on the case and with the clients over several decades. No attorney could replicate the depth of knowledge and experience that he has acquired over that length of time. This also separates Mr. Belodoff from attorneys who specialize in other areas of the law but have no understanding or knowledge of the complexities of this case or the factual issues presented by the plaintiff class. The depth and breadth of knowledge Mr. Belodoff has developed is in a sense irreplaceable.

14. I sat as a member of the legal panel of the ACLU of Idaho for a number of years. Among the items reviewed in that panel's deliberations are civil rights issues of many sorts. In that

role, I learned of the attorneys in our community who have an understanding of, and a practice with some focus on, civil rights litigation. I believe it is fair to say that there is not another lawyer in the Boise legal community who has the expertise or experience Mr. Belodoff has in this type of civil rights litigation.

15. I can state without hesitation that most attorneys in private practice would refuse to undertake this case in the first place because of the complexity of the litigation and attorney's unfamiliarity with the legal issues and substantive facts. Any rational attorney reviewing the case would hesitate to undertake or continue with this appeal after the district court's dismissal after it found the defendants had substantially complied with the consent decrees and court implementation plan. It would undoubtedly appear to be a time and money sink. With my understanding of the case and after reviewing plaintiff's briefing on appeal it is very apparent that the issues in this appeal were unique, complex and postured in a manner that would make the likelihood of success seem remote. My opinion is the limited chance of success on appeal would deter any attorney except one with the specialized knowledge of Mr. Belodoff and with the devotion to his clients and the cause demonstrated over his years of commitment to the representation.

16. Very significantly, the inability of the plaintiffs to pay any fees, the unique risks associated with ever obtaining a fee award in this type of case, the long delays in receiving compensation, and the inability of the plaintiffs to pay for costs all make a substantial hourly fee appropriate. The difficulty, even unlikelihood, of Plaintiffs obtaining counsel with the long-term commitment to make sure a case like this is properly pursued, cannot be overstated. This is especially true for a solo practitioner, such as Mr. Belodoff, or for a small two or three person law

firm because the attorney has to set aside all other clients and cases to devote his full time to this type of litigation. It not only affects his current practice but also his ability to take on other representation


17. The type of advocacy pursued in this case honors the best traditions of our justice system. The repeated successes on behalf of the clients bespeaks of the quality of the work performed.

18. The vast majority of my practice is done on a contingency fee basis. Such a practice contains large financial risks. I frequently evaluate new cases from the perspective of whether to accept it on a contingency fee basis. My evaluation of a case like this one would be that the potential success is far off and the risks of failure would be very high. An attorney in Boise who agreed to take a case on a contingency fee basis would normally recover a fee based upon thirty-three (33) or forty (40) percent of the total recovery or more and the client would have to pay all of the costs. I believe that a contingency fee lawyer in this area would charge a higher rate for this case and most, if not all, would simply refuse to accept a case like this.

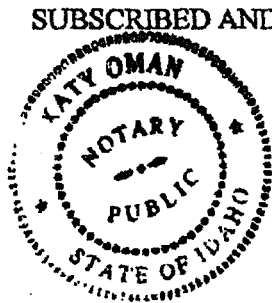
19. The dedication of Plaintiffs' counsel after more than 31 years and the benefits received by thousands of mentally ill Idaho children and their families, the continuing failure of the Defendants' to abide by the Court's Orders, the contingent nature of the attorney's fees award, the rates charged by other experienced counsel in this locale, certainly more than suffices for me to be of the opinion that \$400.00 per hour is a reasonable rate of compensation at this time for Mr. Belodoff's work in the appeal of this case.

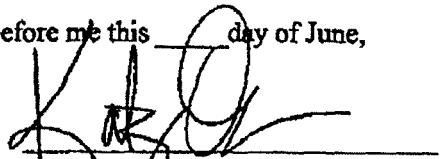
Case 087360692-1/24/11 Document 22-1 Filed 06/28/11 Page 4 of 8

DATED this 20th day of June, 2011.


Kurt Holzer

2011.




Notary Public for Idaho
Residing at: Melba, ID
Commission Expires: 11/24/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of June, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing or I mailed, first class postage paid, a copy of the document to the following person:

James D. Carlson
Deputy Attorney General
Statehouse, Room 210
Boise, ID 83720-0010

Michael S. Gilmore
Deputy Attorney General
Statehouse, Room 210
Boise ID 83720-0010

Charles Johnson
Johnson Olson, Chtd
P.O. Box 1725
Pocatello, ID 83201

Nancy Bishop
Deputy Attorney General
Department of Juvenile Corrections
P.O. Box 83720
Boise, ID 83720-5100

/s/ Howard Belodoff

AFFIDAVIT OF KURT HOLZER IN SUPPORT OF AWARD OF ATTORNEY FEES - Page 8

PAUL THOMAS CLARK
Idaho State Bar No. 1329
CLARK and FEENEY
Attorneys for Defendants
The Train Station
13th and Main Streets
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

Plaintiff,

VS.

Defendants.

Case No. CV **

**DEFENDANTS' MEMORANDUM
OF COSTS AND AFFIDAVIT OF
ATTORNEY FEES**

COMES NOW the Defendants in the above-entitled action and make this Memorandum of

Costs and Affidavit of Attorney Fees expended in the above entitled action as follows:

ATTORNEY FEES

The Defendants are entitled to attorney fees because of the Court's ruling in the Memorandum Opinion and Order on Defendants' Motion for Sanctions and to Strike Pleadings entered by the Court on December 4, 2012.

Defendants' request attorney fees pursuant to I.R.C.P. 37(b)(2) and 37(e). The Defendants have established the Plaintiff failed to comply with the Court order on discovery, and the Court is

required to grant an award of reasonable attorney's fees and costs to the Defendants for the money spent pursuing this motion.

As stated above, virtually all of the work related to the Defendants' Motion for Sanctions and to Strike Plaintiff's Pleadings in the above-captioned matter, related to the claims of the Plaintiffs which were dismissed. The total sum of \$660.00 is reasonable for Defendants' attorney fees based on the work and expertise that was involved in this case. **Exhibit A** attached hereto, and made a part hereof by reference, shows most of the Defendants' attorneys' services rendered on or near the dates shown; that all services shown on said Exhibit A were reasonable and necessary; that Defendants' attorneys and paralegals have expended at least 2.4 hours based upon the time shown on said Exhibit A; the following attorneys/paralegals have worked on the case as indicated by timekeeper code on the attached Detailed Fee Transaction File List marked Exhibit A:

<u>Timekeeper</u>	<u>Name of Person Performing Work</u>	<u>Position</u>	<u>Hourly Rate</u>
01	Paul Thomas Clark	Attorney	\$ 275.00

The hourly rates charged for legal services above mentioned are reasonable and were necessary for the defense of this case. The Defendants were billed at said hourly rates on a monthly basis as work was performed.

The undersigned is an attorney who has been licensed to practice and has practiced in Idaho since 1970. The undersigned is familiar with the normal charges for work done in cases of this nature. It is the opinion of the undersigned that the sum of \$660.00 is a reasonable to be awarded to be awarded in this matter.

DATED this _____ day of December, 2012.

CLARK and FEENEY

By _____
Paul Thomas Clark, a member of the firm.
Attorneys for Defendants.

STATE OF IDAHO)
)ss.
County of Nez Perce)

PAUL THOMAS CLARK, being first duly sworn on oath, deposes and says:

That he is the attorney for the Defendants herein; that he has read the foregoing instrument, knows the contents thereof and the facts stated therein are to the best of his knowledge, information and belief, and that the costs claimed are in conformance with the Idaho Rules of Civil Procedure.

PAUL THOMAS CLARK

SUBSCRIBED AND SWORN to before me this _____ day December, 2012.

Notary Public in and for the State of Idaho
Residing at Lewiston therein.
My Commission expires:

MEMORANDUM OF COSTS AND
AFFIDAVIT OF ATTORNEY FEES -3-

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of December, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Greg Monzo PO Box 5411 Beaverton, OR 97006	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
Greg Monzo PO Box 522 Caldwell, ID 83606	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy

By: _____
Attorney for Defendants

MEMORANDUM OF COSTS AND
AFFIDAVIT OF ATTORNEY FEES -4-

Charles H. Carpenter
 Idaho Bar No. 8322
 Carpenter Law Firm plc
 210 N. Higgins Avenue Suite 336
 Missoula, Montana 59802
 (406) 543-0511
carpentc@carpenterlawfirmplc.com

Lewis County District Court
FILED
 AT 12:00 O'CLOCK PM
 JUL 1 2016

ALESIA WINNER
 Clerk of District Court
 By [Signature] Deputy

Attorney for Plaintiff

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT
 LEWIS COUNTY

PERRY KRINITT)

No. CV 12-146

Plaintiff,)

v.)

IDAHO DEPARTMENT OF)
 FISH AND GAME, and)
 STATE OF IDAHO,)

Defendants.)

MEMORANDUM IN OPPOSITION
 TO MOTION TO RECONSIDER

The Motion to Reconsider filed by the Idaho Department of Fish and Game ("Fish & Game") adds neither relevant facts nor legal argument omitted from the Summary Judgment argument heard by the Court in May 2016. The facts underlying the Rule 16(i) sanction imposed are not in dispute, nor does Fish & Game contest them meaningfully. There is and can be no dispute that Fish & Game failed to assert its statutory employer immunity defense prior to March 2016. The rules of civil

procedure are clear that this should have been done years earlier although this Court, following the Supreme Court in *Fuhrman v. Department of Transp.*, 143 Idaho 800 (2007), has been, in Krinitt's view, overly generous in allowing the assertion of the defense at all, and there is and can be no dispute that Fish & Game failed to follow the rules or the scheduling order in bringing its Motion for Summary Judgment so late. There is, further, no dispute that the Court has the authority, in its discretion, to award sanctions under Rule 16(i). Fish & Game's Motion to Reconsider, then is mere disagreement with the Court's imposition of a sanction.

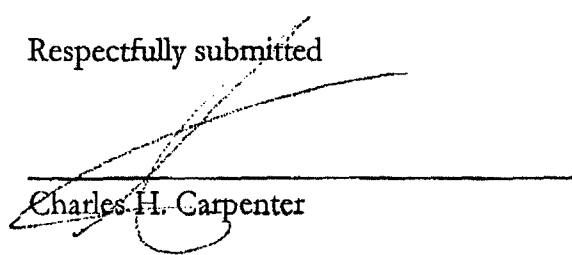
It offers no reasons for this disagreement not already presented to the Court. It claims that the failure to timely assert the defense was an oversight of counsel- this was thoroughly discussed at the hearing, and is well reflected in the Court's opinion. It does not, and cannot, argue that the Court was unaware that it was exercising discretion, that it exceeded the bounds of its discretion, or that the Court did not reach its decision to impose a sanction through an exercise of reason. *See Westby v. Schaefer*, 17 Idaho 116, 621 (2014). Finally, Fish & Game does not address the very real harm its "oversight" caused Krinitt. It thus misses the Court's point completely.

Instead of offering new facts relevant to the sanction, or new legal argument, Fish & Game seems more interested in offering its account about why the mediation failed. Krinitt finds this inappropriate, unseemly, and disagrees completely with Fish & Game's suggestion that he is at fault for the failure of the mediation. An Affidavit from Krinitt's counsel is attached hereto; it concerns only the mediation, and if the

Court agrees that consideration of the discussions at the mediation is improper at this point, Krinitt asks that the Court disregard his counsel's Affidavit and that of Mr. Johnson.

In sum, Fish & Game has given the Court no good reason to vacate its imposition of a sanction. For this reason, the Motion to Reconsider should be denied.

Respectfully submitted

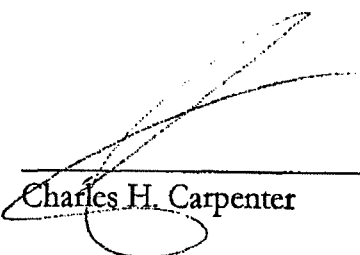


Charles H. Carpenter

CERTIFICATE OF SERVICE

I hereby certify on the 29th day of June, 2016, I served the foregoing by mailing,
by fax and by email to:

Peter J. Johnson
JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317



Charles H. Carpenter

Charles H. Carpenter
 Idaho Bar No. 8322
 Carpenter Law Firm plc
 210 N. Higgins Avenue Suite 336
 Missoula, Montana 59802
 (406) 543-0511
carpentc@carpenterlawfirmplc.com

Lewis County District Court
FILED
 AT 11 O'CLOCK AM
 JUL 11 2016

ALESIA WINNER
 Clerk of District Court
 By [Signature] Deputy

Attorney for Plaintiff

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT
 LEWIS COUNTY

PERRY KRINITT	)	No. CV 12-146
)	
Plaintiff,)	
v.)	
	)	AGREED UPON CALCULATIONS
IDAHO DEPARTMENT OF	)	WITH RESPECT TO FEES & COSTS
FISH AND GAME, and)	
STATE OF IDAHO,)	
)	
Defendants.)	
_____)	

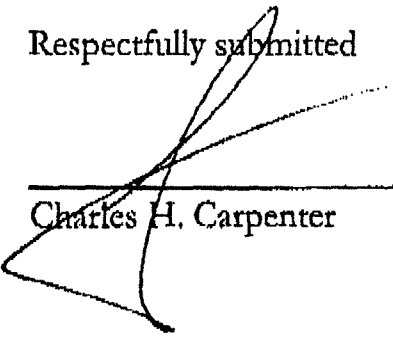
As discussed at the hearing Friday, counsel have consulted and worked through the calculations together. They agree as follows -- the maximum cost / fee amount under the Court's June 1, 2016 Order is \$71,981.83. The agreed upon floor for costs and fees, if any are awarded, is \$58,279.83.

The balance, \$13,702.00, is in dispute, and is comprised of three categories:
 \$9,402 for Carpenter's attorney's fees in connection with the 2016 Summary

Judgment Motion; \$3,400.00 for Sullivan's attorney's fees in connection with the mediation; and \$900.00 for McPherson's travel expenses in connection with the expert depositions in Denver.

Mr. Johnson agrees with these calculations.

Respectfully submitted

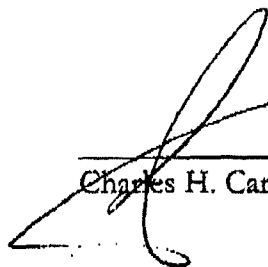


Charles H. Carpenter

CERTIFICATE OF SERVICE

I hereby certify on the 11th day of July, 2016, I served the foregoing by fax to:

Peter J. Johnson
JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207-2317



Charles H. Carpenter

Lewis County District Court
FILED
AT 4:21 O'CLOCK P.M.
JUL 21 2016

ALESIA WINNER
Clerk of District Court
By [Signature] Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT, *et. al.*

Plaintiffs,

vs.

STATE OF IDAHO
DEPARTMENT OF FISH AND
GAME, *et. al.*

Defendants.

CASE NO. CV12-146

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiff Perry Krinitt is awarded attorney fees and costs in the amount of
\$68,581.83.

DATED this 21st day of July, 2016.

[Signature]
Gregory FitzMaurice
District Judge

CERTIFICATE OF SERVICE

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that on this 21st day of July, 2016, served a true and correct copy of the Judgment by mail or fax to:

Peter J. Johnson
103 E. Indiana, Suite A
Spokane, WA 99207-2317

X Mail
_____ Fax

Charles H. Carpenter
210 N. Higgins Ave. Suite 336
Missoula, Montana 59802

X Mail
_____ Fax

By: _____

Deputy Clerk

FILED
AT 4:00 O'CLOCK PM

JUL 21 2016

ALESIA WINNER
Clerk of District CourtBy  DeputyIN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWISPERRY KRINITT, *et. al.*

Plaintiffs,

vs.

STATE OF IDAHO
DEPARTMENT OF FISH AND
GAME, *et. al.*

Defendants.

CASE NO. CV12-146

ORDER DENYING MOTION TO
RECONSIDER

Defendant Idaho Department of Fish and Game, (IDFG) has timely asked the Court to reconsider the portion of its order dated June 1, 2016 which granted Plaintiff Perry Krinitt (Krinitt) expenses and attorney fees incurred since January 31, 2014. The Court imposed the fees as a sanction under Idaho Rule of Civil Procedure 16(i) because IDFG filed their dispositive motion after the scheduling order cut-off date of January 31, 2014.

The decision to grant or deny a motion to reconsider is committed to the discretion of the Court. *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 380, 234 P.3d 699, 704 (2010).

It is also within the Court's discretion to impose sanctions for not complying with a pre-trial scheduling order. *Lepper v. E. Idaho Health Servs., Inc.*, 160 Idaho 104, 369 P.3d 882, 887 (2016), *reh'g denied* (Apr. 15, 2016). In fashioning sanctions, a trial court should 'balance the equities by comparing the culpability of the disobedient party

with the resulting prejudice to the innocent party.' *Peterson v. McCawley* 135 Idaho 282, 284, 16 P.3d 958, 960 (Ct. App. 2000), *citation omitted*.


In its Order, dated June 1, 2016, the Court stated that the Department's delay in filing its dispositive motion was not substantially justified and that there are no circumstances which would make the awarding of fees and expenses to Krinitt unjust. Krinitt was an innocent party that incurred a great amount of litigation expense and time needlessly pursuing a negligence claim. Prejudice to the wronged party is considered to be an aggravating factor when awarding sanctions. *Fish Haven Resort, Inc. v. Arnold*, 121 Idaho 118, 122, 822 P.2d 1015, 1019 (Ct. App. 1991).

In imposing the attorney fee sanction, this Court made the punishment fit the crime and was not a sanction that prevented the adjudication of the merits of the matter. *Id.*, citing *S. Idaho Prod. Credit Ass'n v. Astorquia*, *concurring opinion*, 113 Idaho 526, 529, 746 P.2d 985, 988 (1987).

Courts "... cannot function efficiently unless they can effectively require compliance with reasonable rules. Absence of meaningful power to require that compliance would make for disorder and preclude effective judicial administration at the trial court level." *Id.*, citing *Devault v. Steven L. Herndon, A Prof'l Ass'n*, 107 Idaho 1, 3, 684 P.2d 978, 980 (1984), quoting *Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1332 (9th Cir.1981).

Based upon the above, defendant's motion for reconsideration of its order dated June 1, 2016 which granted Plaintiff expenses and attorney fees incurred since January 31, 2014 is denied.

DATED this 21st day of July, 2016.


Gregory Fitzmaurice
District Judge

CERTIFICATE OF SERVICE

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that on this 21st day of June, 2016, served a true and correct copy of the Order Denying Motion to Reconsider by mail or fax to:

Peter J. Johnson
103 E. Indiana, Suite A
Spokane, WA 99207-2317

X Mail
____ Fax

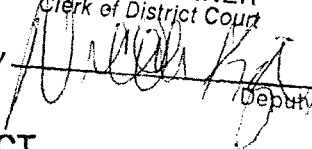
Charles H. Carpenter
210 N. Higgins Ave. Suite 336
Missoula, Montana 59802

X Mail
____ Fax

By: _____

Deputy Clerk

Lewis County District Court
FILED
AT 4:21 O'CLOCK PM
JUL 21 2016

ALESIA WINNER
Clerk of District Court
By  Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT, <i>et. al.</i>	)	CASE NO. CV12-146
)	
Plaintiffs,	)	ATTORNEY FEES ORDER
)	
vs.)	
)	
STATE OF IDAHO)	
DEPARTMENT OF FISH AND)	
GAME, <i>et. al.</i>)	
)	
Defendants.)	
_____)	

Plaintiff Krinitz has submitted a Verified Memorandum of Costs and Attorney Fees in response to the Court's order, dated June 1, 2016. Defendant Department of Fish and Game filed a Motion to Disallow a Portion of Plaintiff's Costs and Attorney Fees. The Court heard argument on the Motion at a telephonic hearing held July 8, 2016. At that hearing the parties agreed to consult and agree on a floor for costs and fees and the maximum amount to be awarded.

Remaining in dispute, as outlined in the document filed July 11, 2016 are \$9,402 for Plaintiff's attorney fees in connection with the 2016 summary judgment motion, \$3,400 for a California consulting attorney, and \$900 for a consulting expert to travel to depositions. The parties agreed that the maximum amount that the Court could award was \$71,981.83. A minimum of \$58,279.83 was also set.

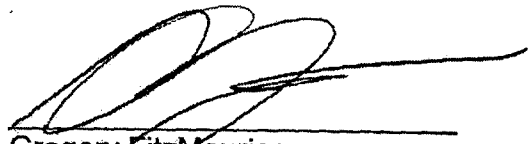
Idaho Rules of Civil Procedure allow the Court to impose attorney fee sanctions for violations of pre-trial orders. *Nepanuseno v. Hansen*, 140 Idaho 942, 947, 104 P.3d 984, 989 (Ct. App. 2004). The choice of sanction is committed to the discretion of the

Court. *Aho v. Idaho Transp. Dep't of State*, 145 Idaho 192, 194, 177 P.3d 406, 408 (Ct. App. 2008).

The Court finds that the per hour fee of attorney Charles H. Carpenter is reasonable and that in considering the reason for the sanction, fees incurred in the amount of \$9,402 for the 2016 summary judgment motion are awarded. Consulting expert travel costs to depositions were also a reasonable and necessary and are awarded. The Court further finds that fees for a consulting attorney in California were not necessary. Carpenter's attendance at the mediation in California was sufficient. Fees for the California attorney are not awarded.

THEREFORE, attorney fees in the amount of \$68,581.83 are awarded to Plaintiff Perry Krinitt.

DATED this 21st day of July, 2016.


Gregory FitzMaurice
District Judge

CERTIFICATE OF SERVICE

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that on this 21st day of July, 2016, served a true and correct copy of the Attorney Fee Order by mail or fax to:

Peter J. Johnson
103 E. Indiana, Suite A
Spokane, WA 99207-2317

☒ Mail
 Fax

Charles H. Carpenter
210 N. Higgins Ave. Suite 336
Missoula, Montana 59802

☒ Mail
 Fax

Nialet H. R.
Deputy Clerk

Lewis County District Court
FILED
AT 1080 O'CLOCK M

AUG 29 2016

ALESIA WINNER
Clerk of District Court

By

Deputy

PETER J. JOHNSON, ISB # 4105
Johnson Law Group
103 E. Indiana, Suite A
Spokane, WA 99207-2317
Phone: (509) 835-5000
Fax: (509) 326-7503
Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT,

Plaintiff-Respondent,

v.

IDAHO DEPARTMENT OF FISH AND
GAME and STATE OF IDAHO,

Defendants-Appellants.

NO. CV 12-146

NOTICE OF APPEAL

TO: CHARLES H. CARPENTER, CARPENTER LAW FIRM, 210 N. HIGGINS AVENUE, SUITE
336, MISSOULA, MT. 59802, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, Idaho Department of Fish and Game, and State of Idaho, appeal against the above-named respondent to the Idaho Supreme Court from the Attorney fees Order and Judgment in favor of respondent entered in the above-entitled action on July 21, 2016, by

00190

the Honorable Judge Fitzmaurice presiding. A copy of the Judgment and Attorney Fees Order is attached to this notice.

2. Appellants have a right to appeal to the Idaho Supreme Court as the judgment described in paragraph 1 above is an appealable order under and pursuant to Rule 11 (a)(1) I.A.R.

3. Appellants intend to raise the following issue on appeal:

- (a) Whether the district court properly awarded respondent attorney fees and costs notwithstanding the fact that appellants were the prevailing party when the district court dismissed respondent's lawsuit with prejudice.

4. No transcript is being requested.

5. The appellants request the following documents be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R. and those already submitted with the Clerk's Record on appeal in connection with appeal filed by the plaintiff-respondent in this appeal on July 11, 2016.

- (a) Defendants Memorandum Of Authorities In Support Of Reconsideration Of A Portion Of The Summary Judgment Memorandum Order And Judgment;
- (b) Verified Memorandum Of Costs And Attorney Fees;
- (c) Defendants Motion To Disallow A Portion Of Plaintiff's Costs And Attorney Fees;
- (d) Defendant's Memorandum In Support Of Motion To Disallow Certain Of Plaintiff's Submitted Costs And Attorney Fees;
- (e) Memorandum In Opposition To Motion To Disallow Certain Costs;
- (f) Memorandum In Opposition To Motion To Reconsider;
- (g) Memorandum In Opposition To Motion To Disallow Certain Costs;
- (h) Agreed Upon Calculation With Respect To Fees And Costs;
- (i) Judgment;
- (j) Order Denying Motion To Reconsider;
- (k) Attorney Fees Order.

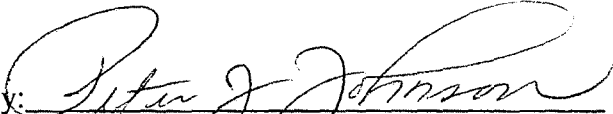
6. No order has been entered sealing any portion of the record.

7. I certify:

- (a) That the estimated fee for preparation of the clerk's record has been paid.
- (b) That no filing fee is required by the State of Idaho or its agency pursuant to state law.
- (c) That service has been made upon all parties required to be served pursuant to Rule 20. See Certificate of Service appended hereto.

DATED: August 26, 2016.

Respectfully submitted

By: 

PETER J. JOHNSON
JOHNSON LAW GROUP
103 E. Indiana, Suite A
Spokane, WA 99207
Telephone: (509) 835-5000
Facsimile: (509) 326-7503
pjohnson@johnsonlaw.org
Attorney for Defendants

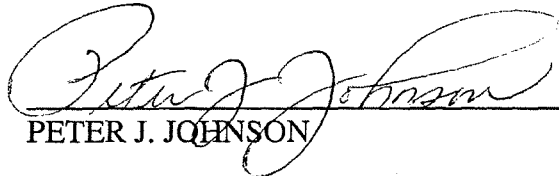
00192

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2016, I caused to be served a copy of the foregoing by mail to the following:

Charles H. Carpenter
Carpenter Law Firm, PLC
210 N. Higgins Avenue, Suite 336
Missoula, MT 59802
Phone: (406) 543-0511
Fax: (406) 258-0365

Lawrence G. Wasden
Attorney General
State of Idaho
700 W. Jefferson Street, Suite 201
P.O. Box 83720
Boise, ID 83720-0010


PETER J. JOHNSON

[X:\1750\Trial Court\Pldg\APPEAL (draft) 2016-08-25.wpd

Lewis County District Court

FILED
AT 4:21 O'CLOCK P.M.

COPY RECEIVED

JUL 25 REC'D

JUL 21 2016

JOHNSON LAW GROUP

By ALESIA WINNER
Clerk of District Court
Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT, *et al.*

Plaintiffs,

vs.

STATE OF IDAHO
DEPARTMENT OF FISH AND
GAME, *et al.*

Defendants.

CASE NO. CV12-146

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiff Perry Krinitz is awarded attorney fees and costs in the amount of
\$68,581.83.

DATED this 21st day of July, 2016.


Gregory Fitzmaurice
District Judge

Judgment-1

00194

CERTIFICATE OF SERVICE

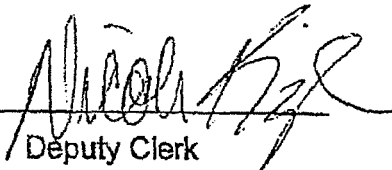
I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that on this 21st day of July, 2016, served a true and correct copy of the Judgment by mail or fax to:

Peter J. Johnson
103 E. Indiana, Suite A
Spokane, WA 99207-2317

X Mail
____ Fax

Charles H. Carpenter
210 N. Higgins Ave. Suite 336
Missoula, Montana 59802

X Mail
____ Fax

By: 
Deputy Clerk

COPY RECEIVED

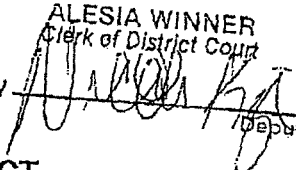
JUL 25 REC'D

JOHNSON LAW GROUP

Lewis County District Court

FILED
AT 4:27 O'CLOCK PM

JUL 21 2016

ALESIA WINNER
Clerk of District Court
By  Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT, *et. al.*

Plaintiffs,

vs.

STATE OF IDAHO
DEPARTMENT OF FISH AND
GAME, *et. al.*

Defendants.

CASE NO. CV12-146

ATTORNEY FEES ORDER

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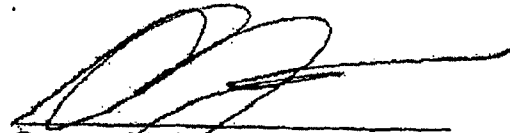
Attorney fee order-1

Court. *Aho v. Idaho Transp. Dept of State*, 145 Idaho 192, 194, 177 P.3d 406, 408 (Ct. App. 2008).

The Court finds that the per hour fee of attorney Charles H. Carpenter is reasonable and that in considering the reason for the sanction, fees incurred in the amount of \$9,402 for the 2016 summary judgment motion are awarded. Consulting expert travel costs to depositions were also a reasonable and necessary and are awarded. The Court further finds that fees for a consulting attorney in California were not necessary. Carpenter's attendance at the mediation in California was sufficient, Fees for the California attorney are not awarded.

THEREFORE, attorney fees in the amount of \$68,581.83 are awarded to Plaintiff Perry Krinitt.

DATED this 21st day of July, 2016.



Gregory FitzMaurice
District Judge

CERTIFICATE OF SERVICE

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that on this 21st day of July, 2016, served a true and correct copy of the Attorney Fee Order by mail or fax to:

Peter J. Johnson
103 E. Indiana, Suite A
Spokane, WA 99207-2317

 X Mail
 Fax

Charles H. Carpenter
210 N. Higgins Ave. Suite 336
Missoula, Montana 59802

 X Mail
 Fax

Nicole R. [Signature]
Deputy Clerk

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF LEWIS

PERRY KRINITT,)
Plaintiff/Respondent)
VS.)
STATE OF IDAHO DEPARTMENT OF FISH AND GAME, and)
STATE OF IDAHO.)
Defendant/Appellant)

Supreme Court No. 4442
Case No: CV-2012-0000146
CLERK'S CERTIFICATE OF APPEAL

Appeal from: SECOND Judicial District, LEWIS County. Honorable GREGORY FITZMAURICE
presiding.

Case number from court or agency: CV2012-146

Order or judgment appealed from: ATTORNEY FEES ORDER AND JUDGMENT

Attorney for Appellant: PETER J JOHNSON

Attorney for Respondent: CHARLES H CARPENTER

Appealed by: IDAHO FISH AND GAME and STATE OF IDAHO

Appealed against: PERRY KRINITT

Notice of Appeal filed: AUGUST 29, 2016

Notice of Cross Appeal filed: NA

Amended Notice of Cross Appeal filed: NA

Appellate fee paid: \$20.00

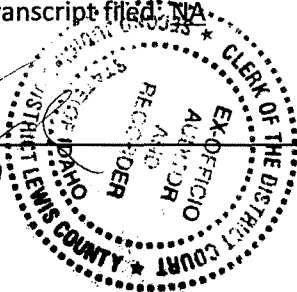
Respondent or Cross-Respondent's request for additional record filed: NA

Respondent or Cross-Respondent's request for additional reporter's transcript filed: NA

Was District Court Reporter's transcript requested? NO

Dated 8-29-16

[Signature]
Deputy Clerk of the District Court



In the Supreme Court of the State of Idaho

PERRY KRINITT,

Plaintiff-Appellant,

v.

IDAHO DEPARTMENT OF FISH AND
GAME and STATE OF IDAHO,

Defendants-Respondents.

PERRY KRINITT,

Plaintiff- Respondent,

v.

IDAHO DEPARTMENT OF FISH AND
GAME and STATE OF IDAHO,

Defendants-Appellants.

ORDER

Supreme Court Docket No. 44326-2016

Lewis County No. CV-2012-146

Supreme Court Docket No. 44442-2016

Lewis County No. CV-2012-146

A NOTICE OF APPEAL was filed in the District Court, on August 29, 2016, from the JUDGMENT entered by District Judge Gregory FitzMaurice and filed on July 21, 2016, which was then assigned to Supreme Court Docket No. 44442. The Clerk's Record in prior appeal No. 44326, *Krinit v. Idaho Dept. of Fish and Game* (Lewis CV-2012-146) was augmented to include the Record and Transcript filed in prior appeal No. 42417, *Krinit v. Idaho Dept. of Fish and Game* (Lewis CV-2012-146). Therefore,

IT HEREBY IS ORDERED that Supreme Court Docket Nos. 44326 and 44442 shall be CONSOLIDATED FOR ALL PURPOSES under appeal No. 44326.

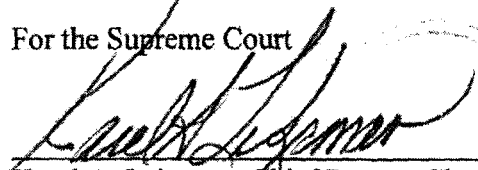
IT FURTHER IS ORDERED that the District Court Clerk shall prepare and file a LIMITED CLERK'S RECORD with this Court, which shall contain documents requested in the Notice of Appeal in Docket No. 44442, together with a copy of this Order, but shall not duplicate any document included in the Clerk's Record filed in appeal Nos. 42417 and 44326. This LIMITED CLERK'S RECORD shall be prepared and served on counsel by Friday, September 16, 2016.

ORDER – Docket Nos. 44326 / 44442

IT FURTHER IS ORDERED that the due date for filing the CLERK'S RECORD AND REPORTER'S TRANSCRIPT in these consolidated appeals shall remain set for September 27, 2016. Upon this Court's receipt of the Record and Transcript, a briefing schedule shall be set.

DATED this 5th day of September, 2016.

For the Supreme Court


Karel A. Lehrman, Chief Deputy Clerk for
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Court Reporter
District Judge Gregory FitzMaurice

Entered on JSI

By: kg

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

Perry Krinitt,
Plaintiff/Respondent

vs.

State of Idaho Department of
Fish and Game and
State of Idaho,
Defendants/Appellants.

CASE NO. CV-2012-146
Supreme Court No. 44442-2016

Certificate of Mailing

I, the undersigned, a Deputy Clerk of the above entitled
Court, do hereby certify that a copy of the Limited Clerk's Record
was mailed on 13th day of Sept, 2016 to the following
persons:

Charles Carpenter
210 N Higgins Ave
Missoula MT 59802

Peter J Johnson
103 E Indiana Suite A
Spokane WA 99207-2317

ALESIA WINNER, CLERK

by

Nicole Kinzer
Nicole Kinzer
Deputy Clerk



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

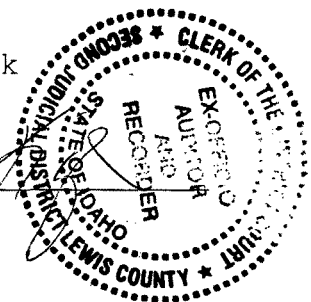
Perry Krinitt,)	
PLAINTIFF/ RESPONDENT	)	LEWIS COUNTY NO.CV-12-146
)	
vs.	)	Supreme Court
	)	Docket NO. 44442-2016
)	
State of Idaho Department of	)	NOTICE OF LODGING
Fish and Game and	)	LIMITED CLERK'S RECORD
State of Idaho)	
DEFENDANTS/APPELLANT)	

NOTICE IS HEREBY GIVEN THAT on the 13th day of Sept, 2016, the Clerk's record in the above referenced appeal was lodged with the District Court Clerk.

The parties shall have five (5) days from the date of service of the appeal record to file any objections, together with a Notice of Hearing, with the District Court. If no objection is filed, the record will be deemed settled and will be filed with the Supreme Court.

Alesia Winner, Clerk

BY: Nieder
Deputy Clerk



Cc: Clerk of the Court
Idaho Supreme Court
P.O. Box 83720
Boise, ID 83720-0101

NOTICE OF LODGING

00203